

No. 14813

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Appellant,
vs.

MARY V. HEAVINGHAM, Special Administra-
trix of the Estate of Arthur V. Heavingham,
deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

OCT 20 1955

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

DUNNE, DUNNE & PHELPS,

333 Montgomery Street,
San Francisco, California,

Attorneys for Defendant and Appellant.

HEPPERLE & HEPPERLE,

1906 Hobart Building,
San Francisco, California,

Attorneys for Plaintiff and Appellee

In the District Court of the United States, North-
ern District of California, Southern Division

No. 33393

MARY V. HEAVINGHAM, Special Administra-
trix of the Estate of Arthur V. Heavingham,
Deceased, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Defendant.

COMPLAINT FOR DAMAGES AND DEMAND
FOR JURY TRIAL

Plaintiff complains and alleges that:

I.

Plaintiff is the duly appointed, qualified and act-
ing special administratrix of the Estate of Arthur
V. Heavingham, deceased; letters of special admin-
istration were issued to her on the 5th day of March,
1954, and ever since said plaintiff has been, and
now is the duly appointed, qualified and acting spe-
cial administratrix of the estate of said decedent.

II.

At all times herein mentioned defendant, South-
ern Pacific Company, was, and now is, a corpora-
tion organized and existing under and by virtue of
the laws of the State of Delaware, and that said
defendant, at all times herein mentioned, was, and
now is, engaged in the business of a common carrier
by railroad in interstate commerce, near the station
of Davis, County of Yolo, State of California.

III.

At all times herein mentioned, defendant was a common carrier by railroad, engaged in interstate commerce, and decedent was employed by defendant in such interstate commerce, and the injuries sustained by him, hereinafter complained of, arose in the course of and while decedent and defendant were engaged in the conduct of such interstate commerce.

IV.

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51, et seq.

V.

On or about February 24, 1954, at or about the hour of 2:32 o'clock a.m., decedent Arthur V. Heavingham was regularly employed by defendant as the head brakeman of a freight train being operated by the defendant between its stations of Suisun and Roseville, California, and more particularly near defendant's station of Davis, County of Yolo, State of California, and was required to and did, in pursuance of his duties as head brakeman ride in the locomotive of said freight train.

VI.

At said time and place defendant carelessly and negligently, in the darkness and in dense fog, stopped on the tracks ahead of said freight train another freight train, and defendant, through its agents and servants other than decedent, carelessly

and negligently ran said freight train, on which decedent was so employed, into and against the rear of said other freight train with such force and violence as to wreck and destroy the locomotive of the freight train decedent was so riding and the caboose at the rear of said other freight train.

By reason of defendant's negligence aforesaid and said wreck and collision, decedent was imprisoned for hours in said wreckage and was so injured and scalded by live steam that after conscious and horrible suffering he died.

VII.

Said decedent died as the direct and proximate result of the carelessness and negligence of defendant aforesaid and said death occurred on the 24th day of February, 1954.

VIII.

Between the time of said accident and injuries sustained by decedent and his death he was conscious and suffered excruciating pain and mental anguish, to plaintiff's damage herein in the sum of \$50,000.00.

IX.

Plaintiff is the surviving widow of said decedent, and Kathleen Heavingham is the minor surviving child of said decedent.

Plaintiff and said minor child were entirely dependent upon the earnings of said decedent for their maintenance and support.

X.

At the time of the death of decedent aforesaid, said decedent was a well and able-bodied man of the age of 56 years, and was earning and receiving from his employment with defendant a regular salary of approximately \$600.00 per month, all of which he contributed to the support of plaintiff and said minor surviving child, Kathleen Heavingham.

XI.

By reason of the facts hereinbefore set forth, plaintiff has been generally damaged in the sum of \$200,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of two hundred fifty thousand dollars (\$250,000.00), and for her costs of suit herein incurred.

/s/ HEPPERLE & HEPPERLE

/s/ HERBERT O. HEPPERLE

/s/ ROBERT R. HEPPERLE

Trial by jury of all of the issues in the above-entitled action is hereby demanded.

/s/ HEPPERLE & HEPPERLE

/s/ HERBERT O. HEPPERLE

/s/ ROBERT R. HEPPERLE

[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of plaintiff on file herein, shows as follows:

I.

Admits as follows:

At all times mentioned in the complaint and herein, defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California and in other states and engaged in the business of a common carrier by railroad in interstate and intrastate commerce in said State of California and in other states.

On or about February 24, 1954, at or about the hour of 2:32 a.m., the decedent Arthur V. Heavingham was employed by defendant as head brakeman on a freight train being operated by defendant between its stations at Suisun and Roseville, California, and in pursuance of his duties decedent was riding in the locomotive of said freight train.

Defendant Southern Pacific Company admits that the freight train upon which decedent was employed was carelessly and negligently operated into and against the rear of another freight train and that in said collision Arthur V. Heavingham was killed.

Defendant admits that decedent Arthur V. Heav-

ingham earned and received from his employment with defendant during the year of 1953 a net amount of \$408 per month after withholding tax.

II.

Defendant Southern Pacific Company is without knowledge or information sufficient to form a belief as to the allegations of the complaint with respect to surviving dependents, decedent's contribution to said dependents, if any, or decedent's general health prior to the accident. Defendant denies each and every allegation of the complaint not hereinabove admitted or denied.

As and for a second, separate and independent answer and defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant Southern Pacific Company here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. Defendant Southern Pacific Company is informed and believes and upon such ground alleges that decedent Arthur V. Heavingham was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself in and about and in respect of said train and his duties thereon. Said negligence and said conduct of decedent, as aforesaid, proximately caused and contributed to the accident.

Wherefore, defendant Southern Pacific Company, a corporation, prays for judgment herein, and for such other, further and different relief as, the premises considered, is reasonable and proper.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 29, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy-five thousand and no/100 dollars (\$75,000.)

/s/ W. F. BRADLEY,
Foreman

[Endorsed]: Filed Feb. 4, 1955.

Southern Division of the United States District
Court for the Northern District of California

No. 33393—Civil

MARY V. HEAVINGHAM, Special Administra-
trix of the Estate of ARTHUR V. HEAVING-
HAM, Deceased, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on February 2, 1955, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Herbert Hepperle, Esq., and Robert Hepperle, Esq., appearing as attorneys for the plaintiff, and John Martin, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on February 2, 3, and 4, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy-five thousand and no/100 dollars, (\$75,000.00), W. F. Bradley, Foreman," and the Court having

ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Seventy-five Thousand and No/100 dollars (\$75,000.00), together with her costs herein expended taxed at \$48.10.

Dated: February 7, 1955.

/s/ C. W. CALBREATH,
Clerk

[Endorsed]: Filed Feb. 7, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the plaintiff above named and to her attorneys:

You are hereby notified that on Friday, the 4th day of March, 1955, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, or at such time as the Court may fix, if it do fix another time, the defendant Southern Pacific Company, a corporation, by its attorneys, will move the above entitled Court, the Division thereof presided over by Honorable Sherrill Halbert, a Judge of said Court, at the courtroom of said Court and Division, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

1. For an order agreeably to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting the defendant Southern Pacific Company a new trial. Attached hereto, marked "Exhibit A" and herein incorporated is a draft of the order which defendant proposes.

2. Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial, including the charge and instruction of the Court and the ruling of the Court on the instructions.

3. Said motion will be made upon the following grounds and each of them severally:

(a) The verdict is against the law.

(b) The verdict is against the weight of the evidence.

(c) The verdict is contrary to the evidence.

(d) The evidence is insufficient to sustain the verdict.

(e) The verdict is excessive.

(f) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive the verdict is contrary to the evidence and to the weight thereof.

(g) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(h) Errors of law in instructing the jury, to

which objection and exception was duly made and taken, on *conscientious* pain and suffering, which required the jury to consider and permitted them to award damages for this element although there was no evidence to support such a finding.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 10, 1955.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR A NEW TRIAL

The matter of defendant's motion to vacate and set aside the verdict and judgment in the above entitled action and grant defendant a new trial therein came on regularly for hearing on April 22, 1955. Both parties appeared through their respective counsel, both parties submitted a written memorandum in support of their position relative to said motion, and both parties argued said motion. The motion was then submitted for decision. The Court having considered said motion and good cause appearing therefor:

It is hereby ordered, adjudged and decreed that defendant's motion to vacate and set aside the ver-

dict and judgment in the above entitled action and grant defendant a new trial therein be, and the same is hereby denied.

Dated: May 12, 1955.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, defendant in the above entitled action, deeming itself aggrieved by the judgment in the above entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of February 4, 1955, herein, and the judgment stamped filed on the 7th day of February, 1955, in the office of the Clerk of the above entitled District Court.

Dated: May 31, 1955.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant and Appellant, Southern
Pacific Company, a corporation

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Southern Pacific Company, a corporation, defendant in the above entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the judgment in said action, hereby designates for inclusion in the record on appeal all of the record and records, proceedings and evidence including all exhibits received in evidence in the above entitled matter.

Without restricting the foregoing, there is hereby designated for inclusion in the record on appeal all of the matters referred to in Rule 75(g) of the Rules of Civil Procedure and a complete Reporter's Transcript of all proceedings, including, but not restricted to, opening statements of counsel, evidence offered and received, instructions to the jury, defendant's objections and exceptions to the charge to the jury and all proceedings on motion for new trial including the order denying that motion, and all of the papers and proceedings to the end that there shall be included therein the **complete record** and all of the evidence and proceedings in the action.

Dated: May 31, 1955.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Defendant.

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, Southern Pacific Company, a corporation, defendant in the above-entitled action, is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action in the above-named United States District Court on the 7th day of February, 1955, in favor of Mary V. Heavingham, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Seventy-Five Thousand Dollars (\$75,000) and costs of suit, and from the whole of said judgment; and

Whereas, said appellant is desirous of staying execution of said judgment so to be appealed from;

Now, therefore, Indemnity Insurance Company of North America, a corporation duly incorporated under the laws of the State of Pennsylvania, for the purpose of making, guaranteeing, and becoming surety on bonds and undertakings and having complied with all of the requirements of the State of California respecting such corporations, does hereby, in consideration of the premises, undertake and promise, and does hereby acknowledge itself bound, in the sum of One Hundred Thousand Dollars (\$100,000), being in excess of the whole amount of

the judgment, costs on appeal, interest, and damages for delay, that if the said judgment appealed from, or any part thereof, be affirmed or modified or if the appeal be dismissed, the appellant will pay and satisfy in full the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all costs, interest and damages which may be awarded against the appellant upon said appeal, and that if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit, or from such other court as may and shall lawfully issue the remittitur in the Court from which the appeal is taken, viz., in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of Respondent, Mary V. Heavingham, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased, and without notice to said Indemnity Insurance Company of North America, a corporation, in her favor against the undersigned surety for such amount, together with interest that may be due thereon and the damages and costs which may be awarded against said appellant upon such appeal.

In witness whereof, the said Indemnity Insurance Company of North America, a corporation, has caused this obligation to be signed by its duly au-

thorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 31st day of May, 1955.

[Seal] Indemnity Insurance Company of
North America

/s/ By GEORGE F. HAGG,
Its Attorney-in-Fact.

Approved: June 3, 1955.

/s/ O. D. HAMLIN,
United States District Judge.

Duly Verified.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for damages.

Answer.

Verdict.

Judgment on verdict.

Notice of motion for new trial.

“I instruct you that under the evidence in this case you may not include in your award any sum for conscious pain and suffering by the decedent.

San Francisco, California

July 18, 1955.

/s/ HEPPERLE & HEPPERLE,

/s/ HERBERT O. HEPPERLE,

/s/ ROBERT R. HEPPERLE,

Attorneys for Plaintiff.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Defendant

Southern Pacific Company.

[Endorsed]: Filed July 20, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMEN-
TAL TRANSCRIPT OF RECORD ON AP-
PEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, *do hereby* that the foregoing document, listed below, is the original filed in the above-entitled case, and that it constitutes a part of the record on appeal herein:

Stipulation containing Defense Instruction No. 9.

In witness whereof I have hereunto set my hand

and affixed the seal of said District Court this 21st day of July, 1955.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ By WM. C. ROBB,
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Before: Hon. Sherrill Halbert, Judge.

Appearances: For Plaintiff: Robert R. Hepperle, Esq., and Herbert O. Hepperle, Esq. For the Defendant: Dunne, Dunne and Phelps, by: John W. Martin, Esq. [1*]

Wednesday, Feb. 2, 1955

(Whereupon a Jury was duly impaneled and sworn.)

Mr. Hepperle: Ready for the plaintiff.

Mr. Martin: Ready for the defendant.

* * * * *

The Court: You may proceed.

Mr. Hepperle, Sr.: Plaintiff will call Fireman Maasen. Will you come forward, please, Mr. Maasen?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

GEORGE E. MAASEN

called as a witness in behalf of the Plaintiff, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your full name to the Court and Jury.

The Witness: George E. Maasen.

Direct Examination

Mr. Herbert Hepperle: Q. Will you restate your name, please? A. George E. Maasen.

Q. And how do you spell that last name?

A. M-a-a-s-e-n.

Q. Where do you live, Mr. Maasen?

A. 211 Joan Avenue, Concord, California.

Q. And how do you spell Joan?

A. J-o-a-n.

Q. What is your phone number there?

A. MULberry 5-8966.

Q. Are you employed by the Southern Pacific Company? A. I am. [14]

Q. How long have you been employed by that concern? A. About thirteen years.

Q. In what capacity are you employed by them?

A. A fireman.

Q. When did you become a fireman, at the beginning or at a later stage of your first employment? A. At the beginning.

Q. Have you promoted to the job of engineer?

A. Yes, sir.

Q. Can you give us that date, or approximately?

A. September, 1951.

(Testimony of George E. Maasen.)

Q. Were you the fireman of any locomotive drawing a freight train on February 24, 1954?

A. Yes, sir.

Q. Is there a name for that train? What was it, an extra or what? A. It was an extra.

Q. And was it a freight or passenger train?

A. A freight train.

Q. You recall about how many cars you had hold of? A. I think it was twenty-nine.

Q. And what manner or style of engine did you have?

A. What they call a Mallet, a cab-ahead engine.

Q. Where did you start your run?

A. Suisun, California. [15]

Q. And was there an accident later after leaving Suisun? Did one take place? A. Yes, sir.

Q. And near or at what station? A. Davis.

Q. That's also in California?

A. That's in California.

Mr. Hepperle: Mr. Clerk, will you please mark these for the plaintiff as Plaintiff's Exhibits in order for identification?

May I, while he is doing that, Your Honor, continue the examination?

The Court: Yes, you may.

Let those photographs be marked Plaintiff's Exhibits Nos. 1 through 12 for identification in the order handed to the Clerk.

(Whereupon photographs referred to above were marked Plaintiff's Exhibits Nos. 1 through 12 for Identification.)

(Testimony of George E. Maasen.)

Mr. Hepperle: Q. Who was your engineer on this night? A. Joe Cooper.

Q. And if you recall, about when did this accident take place? A. About 2:30 a.m.

Q. When you speak of a cab-ahead engine, will you tell us [16] a little about it as compared with the usual locomotive?

A. Well, the cab is pulled to the rear of the engine. In other words, the engine is backing up at all times while proceeding ahead; that is, in respect to the mechanical condition of it, and the cab is built right out in front.

Q. I show you Plaintiff's Exhibit No. 2 for Identification and ask you if you recognize that?

A. Yes, sir.

Q. State whether or not that is a picture or photograph of the locomotive you were in and operating that night. A. Yes, sir.

Mr. Hepperle: We offer in evidence Plaintiff's Exhibit No. 2.

Mr. Martin: May I see it, Counsel?

(Counsel handing Mr. Martin Exhibit No. 2.)

Mr. Martin: Your Honor please, under the issues in this case I fail to see the relevance of photographs here. We have admitted that Mr. Heavingham was in the cab of the engine; there is no issue as to speed or force of impact or anything of that nature.

The Clerk: May I have the exhibit?

The Court: What is your theory of the admissi-

(Testimony of George E. Maasen.)

bility, Mr. Hepperle? I am in a little quandry, myself.

Mr. Hepperle: On two grounds, Your Honor. The first, in respect of the claims of contributory negligence raised [17] by the answer to which reference has been made.

The Court: We are not to that at this stage of the proceedings. I think we all recognize the burden is upon the defendant to establish that. If he doesn't offer any evidence on it, why, he can't stand on that, so we can't anticipate that defense, alleged defense at this time.

Mr. Hepperle: Secondly, upon the ground of conscious pain and suffering. Where was this man; what were the circumstances; what took place? And then wholly aside from that is the additional ground and reason that for the sake of illustration of rendering intelligible the testimony and bringing out exactly what the condition was, what happened and what confronted Mr. Heavingham in all aspects in which his presence in that cab is involved in this lawsuit.

The Court: For the moment I am going to sustain the objection, without prejudice. In other words, I don't mean by that that I am not going to admit this photograph, but at this stage of the case I will leave it for identification only. I may say right now there may be certain photographs I will admit and certain photographs I won't, or I may admit them all, or I may admit none, but I do not want to admit this photograph at this time.

(Testimony of George E. Maasen.)

Mr. Hepperle: May I have Your Honor's consideration, then, of these others, or shall I offer them separately?

The Court: Well, if you would like me to—I will [18] look at them and if there is some that I think you may proceed on, why, I will. I can't anticipate what objection—perhaps there won't be any objection, but I will take a look at them.

Mr. Hepperle: While Your Honor is examining those, may I hand the Clerk an additional group to be marked?

The Court: Yes, you may do so. They may be marked in numerical order, starting in sequence after these——

The Clerk: Eight, Your Honor.

The Court: All right, let them be marked.

The Clerk: The eight, 13 through 20.

(Whereupon eight photographs referred to above were marked as Plaintiff's Exhibits Nos. 13 through 20 for Identification.)

Mr. Hepperle: Shall I continue, or would it be more expeditious to wait your glancing at the others, too.

The Court: I think perhaps I will look at the others, too.

Mr. Hepperle: Thank you.

The Court: At this juncture of the case—I mean the photographs may be marked for identification, but I do not see that they have any probative value at this juncture. However, that is without prejudice.

(Testimony of George E. Maasen.)

Mr. Hepperle: Yes, sir.

Mr. Hepperle: Q. What is the seating arrangement in [19] this type mallet, and in particular the mallet engine that you had that night?

A. Well, there is an engineer's seat box on the right hand side.

Q. Describe it a little, will you, please?

A. Well, it is a metal box with a cushion seat on it where you carry—inside the box you carry your grip and jacket, and it's right next to an open window.

Q. And was that engineer's window, to your knowledge or not, open on this night and at the time of the accident? A. It was open.

Q. Is there a fireman's seat?

A. On the opposite side of the engine.

Q. Is it similar except that it is on the opposite side to the engineer's seat box? A. That's right.

Q. Now, is there a third seat?

A. There is a third seat in the—at the front of the engine, front of the cab, I should say, just a little bit to the left of the center of the cab.

Q. And what, if anything, is in front of it?

A. The—a window.

Q. Is that a window, an open window or a closed window? A. It is a closed window.

Q. Now, as your train was proceeding, were you working as fireman? [20] A. Yes, sir.

Q. And was the engineer operating the engine?

A. Yes, sir.

Q. Where was he seated and as you approached

(Testimony of George E. Maasen.)

the station of Davis, did you observe what he was doing, what the engineer was doing?

A. Yes, he was slowing the engine down.

Q. And what, if anything, did you observe him do with respect to a lookout; was he looking out of the window on ahead or what?

A. Oh, I see, yes, he was looking out of the window ahead.

Q. To explain myself, I am sure Counsel and His Honor will permit me to say that these have to go into the record, and so far as we are advised, the Jury are not railroad or train people, and so if you can tell us simply, but as clearly, how these things are.

A. Well, there is an arm rest on this window, and you usually lay on that arm rest and look out the side of the window.

Q. Is the cab so built that when in that position and so leaning one can see ahead? A. Oh, yes.

Q. What about the fireman's seat and window, is that similar? A. Similar, yes.

Q. As this train was approaching Davis, what, if anything, were you doing? [21]

A. I was looking out for signals.

Q. Where was Mr. Heavingham?

A. He was sitting in the fireman's seat box.

Q. In what seat box?

A. I mean—I beg your pardon, the brakeman's seat box.

Q. Now, just to speak of that a minute, do they

(Testimony of George E. Maasen.)

call it any particular brakeman's seat box, head brakeman, for instance?

A. Yes, head brakeman's seat box.

Q. I want you to explain the term—it will probably come up here—what does head brakeman mean?

A. The head brakeman is the brakeman that works the head end of the train and rides on the engine.

Q. And is there also just in counterdistinction a rear brakeman? A. Yes, sir.

Q. And so labeled and named because he is at the rear of the train and his duties are at that end? A. That's right.

Q. Now, as your train, so being operated, approached the station of Davis, tell us in your own words what you observed with respect to signals, if any.

A. We observed a yellow signal, which is—precedes a red one, and as we got opposite the water tank, there is a water tank in Davis, there is another signal which is—which was green. [22]

Q. Now, before you continue, when you came upon or it became visible to you, this first yellow signal, what, if anything, did you do in respect of it?

A. Why, I called the signal out; Mr. Heavingham called it out; and the engineer called it out.

Q. When you observed the next one, what if anything did you do?

A. We three called them out.

(Testimony of George E. Maasen.)

Q. Will you continue, then?

A. To one another.

Q. You are now, I believe, at the water tank.

A. Yes, the fog had lifted momentarily at that point.

Q. Let me stop you there, because it is my fault, I didn't ask you, but describe whether this was light or dark.

A. It was dark.

Q. And what hour?

A. Oh, I should judge that would be around, I would say around 2:25, in my judgment.

Q. And what were the weather or visibility conditions, tell us about that?

A. The weather was very foggy and visibility was at that point, I should judge, about eight cars, eight car-lengths, which would be around—50-foot car-lengths.

Q. Did the visibility vary from time to time?

A. Yes.

Q. Now, will you tell us where—where you left off you had gotten, I believe, to the water tank. You found a certain signal, you called it out, as did the others, and then proceed from that point.

A. The next signal there is on a signal bridge and it was [23] yellow, and the fog settled down very heavy there, and we were, we all called the signal out to one another; and we continued looking for a red signal expecting the next one to be red.

And, as I say, the fog settled down and visibility, I would say, would be around two to three car lengths. And Mr. Cooper, the engineer, was going

(Testimony of George E. Maasen.)

at a reduced rate of speed; he had slowed down. And just before we arrived at the red signal, he had shut the throttle off altogether and was applying the engine brakes. That is just the brakes on the engine, not on the train, and slowing the train down.

Well, when we arrived at the red signal, it just came right out of the fog all of a sudden, and we all called it immediately, Mr. Heavingham and myself, and the engineer, he didn't—he saw it at the same time we did, and he put the train in emergency, that is, applied the emergency brakes.

Q. Tell us at this juncture, if you will, something in simple form about emergency brakes and how they are applied and what they are in respect to braking power.

A. Well, there is an emergency brake handle—I should say it's a brake valve handle, and you can apply the brakes with that, or put it all the way over in emergency. That's just throwing it all the way over. And that's, put the whole train in emergency, applies the brakes on every car and the engine, and that is the fastest way you can stop one.

Q. Tell us what happened.

A. Well, just about the time we saw that signal, or just a short while, two or three seconds, probably, after we saw the signal, I saw the markers on the caboose, that is, a red light on each side of the caboose. And of course the train was in emergency, there was nothing else to do to stop it.

Mr. Heavingham, as soon as he saw the markers

(Testimony of George E. Maasen.)

which was, I should judge, about two car lengths away, got up from his seat box and walked over to the engineer's side. I thought he was going to open the door and jump out—it flashed through my mind that is what he was going to do.

So I watched the coupling of the caboose for just about a second, getting closer, and then I got up on my seat box. Mr. Heavingham had come back to my side and stood right in front of me, almost on my feet, and I got up on the seat box to shut the oil valve off at the tank. There is an emergency oil valve cord in the cab of the engine on the fireman's side for just such an occasion, or a brake-into or the engine turning over, that pulling that emergency cord will shut off the oil valve at the tank which would put out the fire in the engine.

I thought of fire immediately, and I got up on my seat box to reach for that, and at that time, why, we hit the caboose. [25]

I was facing the—in other words, the back of the engine, my back, was toward the front of the engine reaching for this when it hit, and a steam pipe broke right in front of my face and burned my face quite badly, my eyes and the side of my ears and neck, and at that something else broke loose in there and hit me just a little below the chest and knocked me out the window.

Just as I was falling out the window—I didn't want to hit the ground, because it is a long ways down, so I reached up to grab for something, and my hands came in contact with something. About

(Testimony of George E. Maasen.)

that time I passed out. I don't know when I hit the ground, and I woke up crawling on my hands and knees along the right-of-way right opposite the engine over two more tracks.

I looked back to see what had happened, and I still saw the fire flickering in the firebox, so I went back over to the tank, back over to the engine, and got on top of the tank and shut the oil valve off which put out the fire in the firebox.

Then I walked up the running board to the cab window on my side to try to get in there, and the steam was so hot I couldn't get near it. And I went back to what they call a monkey deck, I never heard it called anything else. It is a deck between the engine and the tank, and there's a ladder getting up to that—on each side. [26]

I went back to the monkey deck, crawled up the ladder and went up the engineer's side, crawled up his ladder as far as the window, and the steam was so hot there I couldn't get near it. And I got back down and I saw somebody down there and he asked me something; he said something to me. I don't know what it was. I told him to give me a hand; I have got a fireman—a brakeman and an engineer in there in that cab, help me get them out.

He said, "Well, I am the engineer." Of course, I had never seen the man with his hat and glasses off, and it was dark, too, so I a good close look at him and I said, "I am sure you got out, Joe." So I said—he asked me is the brakeman in there. "I guess he is in there, I don't know, I haven't seen him."

(Testimony of George E. Maasen.)

So I went around my side again and tried to get in the ventilator, which is just above the cab, and the steam there was boiling out. Then I thought of the blow-down valve which releases the steam from the boiler. So I walked along the top of the engine at the other end and I opened that and I got back down on the ground. And that is all I could do.

I couldn't—I tried to get in the cab on each side again and I couldn't get in, couldn't get up in front of the window.

So by that time I met the conductor and evidently he had [27] called the ambulance—I don't know who called him or when, but I heard the siren of the ambulance and you couldn't see the highway, it was so foggy.

So then the ambulance drivers came over and we started back to the ambulance. The ambulance drivers and the conductor helped the engineer and I over. And I happened to hear the steam quit blowing, so I told them, "I am going back and look in that cab."

The said, "No, come over to the ambulance."

I said, "No, I am going back and look in the cab." So I went back and got up on the running board on my side, walked up to the window again, and in the meantime, on my way back alongside the engine a brakeman handed me a fusee. Mr. Heperle explained what the fusee is. That was the only light I had, so I lit that and looked in the window when I got up there and I saw Mr. Heavingham. I didn't know whether—I wasn't sure whether he was

(Testimony of George E. Maasen.)

dead or not, but I got down, I went back to the engineer and I said, "Well, Art's gone." That was Mr. Heavingham's name, that is what we called him.

He said, "What do you mean? Did he—isn't he in there?"

I said, "Yes." I said, "That isn't what I mean." I said, "Art's dead."

So we went back to the ambulance and I stood in the open door leaning against the front seat and told the conductor to [28] take his light and show the ambulance driver how to get up to the cab. He didn't know the ladder was gone on my side. So I told him he would have to walk up the running board and take the ambulance driver and show them how to get up there and take a look at Art, I said, and make sure before we leave. So he did. And he came back, one of the ambulance drivers—I asked him, "How did you find him?"

He said, "He never knew what hit him."

And they put me on the stretcher, put me in the ambulance and went to Sacramento.

Q. When you went back with the fusee and for the first time after the accident again observed Mr. Heavingham, where was he? Describe his position, and so forth.

A. Well, he was laying on his back and I think he was laying on his seatbox on his back. Only saw him from his waist up. And his face was turned more or less to the left, which would be toward the front of the engine. And he was very white.

(Testimony of George E. Maasen.)

Q. Now, I didn't want to interrupt your narration, but you used the term tank. Will you describe to us what a tank on a locomotive is?

A. A tender of the engine that carries the oil supply and water supply for the engine.

Q. And how does the oil get from the tank to the locomotive?

A. Well, in this particular engine it's—the tank is so far back from the fire box it is delivered by an air pressure in [29] the tank to force the oil to the firebox.

Q. You speak of shutoff valves. How many were there in relation to the equipment for shutting off the oil and where were they located?

A. Well, there was two, one in the engine.

Q. And was that the one you first referred to which you tried to reach? A. No.

Q. Keep going and tell me.

A. No, I wanted to shut off the tank valve, shut off the oil supply completely at the tank.

Q. But when you were in the engine and said you got up on the seatbox, what did you reach for to shut what off?

A. I reached for what they call the emergency shutoff valve, oil shutoff valve.

Q. That would be one valve that is inside the cab, would it?

A. No, that is on the tank. The cord runs from the engine back to the valve at the tank.

Q. And what position did you have to take in

(Testimony of George E. Maasen.)

order to reach that valve; in attempting to reach it, what position did you take?

A. I stood up on my seatbox to reach up to the top. It is up near the top.

Q. If I understood right, you didn't get it out?

A. No. [30]

Q. Didn't get it shut off?

A. No, I just turned around and put my hand up there.

Q. Now, I appreciate to you this is obvious, but tell it to me, if you can briefly. The fire was burning where? A. The firebox.

Q. And describe a little bit how this fire produces steam, by what means roughly, by what method.

A. Why, by oil, and the heat goes through flues which are pipes towards the opposite end of the firebox, and that heats the water to produce the steam.

Q. And the water you have already indicated, like the oil, comes from the tank?

A. That's right.

Q. Now, about how high was the top of this tank from the ground? Roughly, what is that distance, if you can give me an estimate?

A. I would say roughly from 12 to 14 feet.

Q. And what distance would you say it would be from the gangway or walkway in the back of the engine on the engineer's side to the rail or right-of-way? What distance would one—Put it this wise—getting into the cab or starting from the ground, assuming it to be level, how high would

(Testimony of George E. Maasen.)

he have to go to get into the cab to take his position?

A. Well, I would say between eight and nine feet.

Q. And how is the equipment formed or made for that purpose? What is it? [31]

A. A ladder, iron ladder, and grabirons; that is, two handles on each side.

Q. Grabirons are also used as a term, are they not, in relation to ladders alongside of boxcars and the like? I am just distinguishing for the record. When a brakeman climbs the side of the car what does he climb on?

A. I guess they are ladders, yes.

Q. And they are also referred to as grabirons, are they not? A. (No answer.)

Mr. Hepperle: It is immaterial, here, at least.

Q. Now, can you give us something of an estimate as to how long this all took before the ambulance arrived?

A. It is pretty hard to estimate the time.

Q. But in the course of it you made all the movements that you tell about? A. Yes.

Q. What was the effect, if any, of leaving of the fire having necessarily been left on after the accident; what would happen with that fire in there?

Mr. Martin: Well, I am going to object to that as indefinite. I don't know quite what counsel is driving at. I think the question is vague.

The Court: You understand the question, Mr. Maasen?

(Testimony of George E. Maasen.)

The Witness: Yes, sir. [32]

The Court: All right, you may answer it, then.

The Witness: A. The fire could very easily have caught the engine on fire.

Mr. Hepperle: Q. State whether or not the continuing fire would also cause additional steam.

A. Yes.

Q. And keep the heat up in the engine?

A. Yes.

Mr. Hepperle: I am wondering, Your Honor——

The Court: Just about to say we are going to take the afternoon recess at this time.

Ladies and gentlemen of the jury, we will take a brief recess at this time. You will remember the admonition of the Court heretofore given.

(Short recess.) [33]

The Court: After each recess I am simply going to announce that all are present in the jury box unless it is made clear to me that such is not the fact.

It will be deemed that all the jurors are present and in their proper places?

Mr. Hepperle: Yes, Your Honor.

Mr. Martin: Yes, Your Honor.

Mr. Hepperle: Q. I show you a batch of photographs—Mr. Clerk, is the larger group 1 to 12 inclusive?

The Clerk: Yes, sir.

Mr. Hepperle: Presently marked Plaintiff's 1 to 12 inclusive for identification only.

(Testimony of George E. Maasen.)

Q. You have seen these before, but would you glance through them again? A. Yes, sir.

Q. Would you tell us whether or not they are photographs of the locomotive involved in this accident? Just answer the question.

A. Yes, sir.

Q. I next show you another group, plaintiff's Exhibit No. 13 to 20 inclusive, for identification, and ask you the same question. Are they pictures of the locomotive involved in this accident?

A. Yes, sir.

Q. State whether or not from the time that the red board was [34] called and the engine you applied to same in emergency the subsequent events happened rapidly or not? A. Yes, sir.

Q. With respect to your getting about, will you tell us why you used a term such as "walk." In relation to walking, tell us what you encountered or what you covered in a little more detailed way. For instance, you say you went up on the tank. We don't know, not being railroad men, how you go to get up on the tank. Describe what you had to do.

A. Climb up a ladder.

Q. And give us an idea how long a ladder.

A. Well, it—the tank, as I said before, is between 12 to 14 feet high and about halfway up I can reach the oil valve.

Q. Now, in relation to getting around the engine and getting down on the ground, there were a number of instances that—I won't cover now, but just pick up one and sort of tell us the route you had to

(Testimony of George E. Maasen.)

travel, what you had to cover to get to the ground.

Let me be more specific. You recall you testified to the occasion where you met the engineer?

A. Yes.

Q. He didn't have his glasses or hat on?

A. Yes, sir.

Q. Where was he at that time, which side of the locomotive, the engineer's side or——? [35]

A. On the engineer's side standing near the locomotive about—I imagine about halfway between the tank and the front of it, as close as I can judge.

Q. Now, on the occasion when you got the fusee from the trainman, where did you meet him?

A. Near the front of the locomotive.

Q. You next mentioned meeting the conductor and walking over somewhere. Where did you go with the conductor?

A. Over what they call the monkey deck.

Q. Did you go with the conductor to the ambulance at any time? A. Yes.

Q. Where did you meet him before you started together with him over to the ambulance?

A. Alongside the engine, I would say, in the vicinity of the monkey deck.

Q. Did you at any time run around the front of the engine or the rear of the engine in order to get from one side to the other? Just answer yes or no. A. No, sir.

Q. How did you have to go to get from one side to the other? A. Over the monkey deck.

Q. Is it a correct term to say, descriptive, as an

(Testimony of George E. Maasen.)

engineer and fireman, that you had to climb over to get over the top of it, around it, or how? [36]

A. Climb up to the monkey deck which is, I imagine, around five feet from the ground. Then walk across to the other side which is the same width as the engine.

Q. And where would you go over the top of the engine, around the front part, or how?

A. To get to the other side?

Q. Yes.

A. No, climb up on the monkey deck and walk across the deck and down on the other side.

Q. Well, see if I understand it. You had to climb up. You got to the monkey deck by using the monkey deck. When on it you crossed on to the other side, is that it? A. That's right.

Q. Down on that side. You got down on the occasions you have testified about?

A. That's right.

Q. You are here under subpoena, are you not, of the plaintiff? A. Yes.

Q. You testified after this accident at the ICC investigation, did you not? A. Yes, sir.

Q. Were you hospitalized for your own injuries?

A. Yes, sir.

Q. I neglected to ask you this question: Before the ambulance left, what was the condition of your appearance? [37] A. Well, my—

Q. Especially your face?

A. My face was terribly swollen and burned.

(Testimony of George E. Maasen.)

Q. Give us more description. How swollen was it with respect to recognizability, if you know?

A. Well, everybody I happened to see didn't recognize me.

Q. Did you know Heavingham, Arthur V. Heavingham, the deceased, before the night of this accident? A. Yes, sir.

Q. What was this run, was it a regular assigned run for you? A. Yes, sir.

Q. Had you worked with Heavingham on prior other occasions? Or had he worked in relation to any train, or around any train?

A. Only on this particular run.

Q. That's where you came to see him and know him as the head brakeman?

A. No, I—I had met him on a passenger train—they call it the Owl, going to Los Angeles, on three or four occasions when he was on duty, and I was riding as a passenger.

Q. State whether or not before this accident you observed Arthur V. Heavingham as to his health and physical appearance. Just say yes or no, please. A. Yes.

Q. I have to state this for the record, as it may be technical; so that I understand it, tell the Court and jury what [38] you observed in respect as to his apparent health and physical makeup.

A. It was good so far as I observed.

Q. You have railroaded, I believe you said, for some 13 years? A. Yes, sir.

Q. State whether or not you have often had

(Testimony of George E. Maasen.)

head brakemen ride in the engine cab on different runs? A. Yes, sir.

Q. Are you familiar with the work of head brakemen in such cabs and locations?

A. Yes, sir.

Q. Have you so been over the years?

A. Yes, sir.

Q. State whether or not Mr. Heavingham did everything he possibly could in the situation that he was then in.

Mr. Martin: Object as calling for a conclusion.

Mr. Hepperle: Withdraw it.

Q. State whether or not there was anything that Mr. Heavingham as a head brakeman failed to do before this accident took place.

Mr. Martin: Object to that, Your Honor, on the grounds that it is a question for the trier of the fact.

The Court: Objection sustained.

Mr. Hepperle: Q. State whether or not you observed Mr. [39] Heavingham while the engine was proceeding toward Davis prior to the time that it arrived there. A. Yes.

Q. Did you have your eyes glued on him or observe him from time to time?

A. Observed him from time to time.

Q. What did you observe in respect to his giving attention to signals?

A. Why, he was watching for the signals just as intently as I was.

(Testimony of George E. Maasen.)

Q. State whether or not he called the signals as soon as you did, as soon as you saw them.

A. Yes, sir.

Mr. Hepperle: At this time, if Your Honor please, the plaintiff formally offers in evidence the group of photographs, Nos. 1 to 12 inclusive, marked presently for identification only, and separately it likewise offers in evidence the further group of photographs Nos. 13 to 20 inclusive.

Mr. Martin: I will renew my objection in view of issues in this case.

The Court: Objection sustained at this time.

Mr. Hepperle: You may cross-examine.

Cross-Examination

Mr. Martin: Q. Mr. Maasen, after this collision had [40] occurred—let me withdraw that. Can you state if there was a block signal at or near the point where the accident happened?

A. Yes, sir.

Q. And what type of signal was that?

A. Semaphore signal.

Q. That signal is a signal with two semaphore arms, is that correct? A. That's right.

Q. And at night that signal also has lights connected to it, does it not? A. Yes, sir.

Q. And those lights are red, yellow and green, is that right, sir? A. Yes, sir.

Q. You have already referred to yellow signals that you passed prior to coming to this particular signal. Do you recall that? A. Yes, sir.

(Testimony of George E. Maasen.)

Q. And a yellow signal, I believe you said, means that the block ahead is occupied, is that correct?

A. No, sir, it means the signal ahead will be red.

Q. I understand.

A. The following block is then occupied.

Q. So we will understand it, the train is proceeding in a [41] direction, say, east. The various points along the right-of-way are these signals you have been talking about, are they not?

A. Yes, sir.

Q. And if a signal has a yellow aspect it means that the signal immediately ahead of it is red, the next signal beyond it? A. Yes.

Q. And when that is red it means that the block ahead of that signal is occupied, is that right?

A. Yes, sir.

Q. So when you see a yellow signal you know that the block ahead of you is not occupied, but the block ahead of the one ahead of you is occupied; is that right, sir?

A. No, sir. You expect the next signal to be red but it could be yellow. A train traveling ahead of you could keep going in one block ahead all the time, but that didn't happen in this instance.

Q. In other words, a train traveling ahead of you the same speed as you do but separated by more than a block, you will be running consequently through signals; is that right? A. Yes, sir.

Q. If that train stops in a block you will come to a yellow signal and then the next signal will be

(Testimony of George E. Maasen.)

red to indicate there is something in that block just ahead of it? [42]

And these blocks in the train that you were traveling in is an area—can you tell us approximately how far it is between signals?

A. No, I don't believe I could.

Q. Would it be in the order of four-fifths of a mile, if I may refresh your recollection?

A. I wouldn't want to say, because I wouldn't know.

Q. Yes. It is some considerable distance; let us put it that way, isn't that right, sir?

A. I believe that in those particular blocks I think they are a little shorter than the average.

Q. In the neighborhood of thousands of feet, is that not right, sir?

A. Yes.

Q. Yes. And now the red block signal that you observed shortly before this accident happened, can you tell us where that was with relation—withdraw that.

—about how far that was from the standing caboose with which it collided?

A. In my estimation it was between two and three car-lengths.

Q. And that would be on the basis of a 50-foot car-length, is that right, sir?

A. Yes, sir.

Q. And after this accident occurred, you have told us that you were thrown from the window on the fireman's side, is that correct, sir. [43]

A. Yes, sir.

(Testimony of George E. Maasen.)

Q. And where were you when you first gathered your senses after this happened?

A. I was across two more tracks and on the right-of-way.

Q. So we can understand this, in this area where this accident occurred, there is what is known as a double track?

A. That is right.

Q. Eastbound and westbound track?

A. Yes, sir.

Q. You were proceeding on the eastbound track, is that right?

A. That's right.

Q. And circling in the direction of motion which you were moving, the other set of tracks would be immediately to the left of the engine which you were occupying, is that right?

A. That's right, sir.

Q. So when you—your first awareness after this accident you were, did you say between or on the other side of the double track to your left?

A. No, I was on the other side, but there is a side track there, a siding also parallel to the westbound main line. I was across both of those.

Q. I see.

A. And I was crawling on my hands and knees.

Q. And what did you first do after that? [44]

A. First thing I did was stand up and look around, and the first thing I saw was the fire flickering in the firebox.

Q. And at that time did I understand it you were alone, you observed no other people around?

A. That's right.

(Testimony of George E. Maasen.)

Q. Now, at some point other crew members from both your train and the standing train gathered around the scene, is that right, sir?

A. That's right.

Q. How long was it before any—the first person came to this area?

A. Well, I had put the fire out and I was down on the right hand side of the engine—the monkey deck, I should say. I had gotten down on the ground before I had seen anybody.

Q. I see. And that person that you observed at that time, was he a member of your train crew or a member of the standing train crew?

A. I couldn't tell you the first person I saw; I couldn't tell you a member of any crew or not.

Q. So at any rate you recognized him as a railroad worker, is that right, sir?

A. I hardly recognized him, somebody just passed me and that is all.

Q. All right. Any any rate, you got up from where you were on the ground, went over and put the fire out by climbing up [45] on the tank, as you told us, is that right?

A. That is right.

Q. And after you had done that someone came upon the scene, is that right, sir? Is that a fair statement?

A. Yes.

Q. And I suppose after that other members—withdraw that. Members of both train crews arrived at the scene after that, is that correct, sir?

A. That's right.

(Testimony of George E. Maasen.)

Q. Now, when you came upon this red signal I believe you said that the engineer put the brake in emergency at just about the same time that you observed the signal, is that right?

A. He put it in emergency exactly at the same time.

Q. And at that time you called the signal red, is that right? A. That's right.

Q. And did Mr. Heavingham call the signal?

A. Mr. Heavingham called the signal.

Q. And what did he call it?

A. He called it yellow.

Q. And did you again call it red?

A. I did.

Q. Yes. Now, this business of calling signals, Mr. Maasen, is a job that is done by those members of the crew occupying the cab of the engine, is that right, sir? A. That is right. [46]

Q. And it is a cross check of the various people in the cab of that engine to make sure that they get these signals correct, is that right, sir?

A. That's right.

Q. I believe you testified in response to a question by Mr. Hepperle that you attended a joint hearing conducted by the Interstate Commerce Commission and the Public Utilities Commission of the State of California? A. Yes, sir.

Q. In reference to this accident.

A. Yes, sir.

Q. And on that occasion, sir, you were aware that the speed tape on this train showed it was

(Testimony of George E. Maasen.)

going 21 to 22 miles per hour at the time of impact?

A. Yes.

Mr. Hepperle: Just a moment. That is objected to as hearsay, no proper foundation laid. If you would like, I have the record, and he has it. It isn't the best evidence. Let us put the record in.

Mr. Martin: Whatever you say, I am willing to stipulate.

The Court: I can tell you right now we are not going to put any record in and sit here a couple of days while we read from the record. We have to stick to the issues.

Mr. Hepperle: I might say, Your Honor, I have no intention of reading it. It is a paper that relates to the accident. [47]

Mr. Martin: Referring to the tape itself, counsel? I mean, are you willing to stipulate——

Mr. Hepperle: Leave it, go ahead.

Mr. Martin: Q. Well, let me get at it this way, Mr. Maasen. What is your estimate of the speed of the locomotive at about the time of the impact?

A. I estimate between 12 and 15 miles an hour.

Q. I see. You are aware that the locomotive did carry a speed tape, are you? A. Yes.

Q. And that is a device which registers the speed of the locomotive at all points during its run?

A. That's right.

Q. It is a tape on which an inked record is kept for use by the operating department of the railroad after each run, is that right, sir? A. Yes.

Q. Now, let me ask you this, Mr. Maasen: at any

(Testimony of George E. Maasen.)

time before this accident occurred, did either you or Mr. Heavingham make any comment or statement to the engineer that his speed was too fast under the existing circumstances?

A. No, sir.

Q. And as I understand your testimony, the visibility was quite limited, not only by darkness, but by fog, is that right, sir. [48]

A. Yes, sir.

Q. And shortly before this accident occurred I believe you testified that you all had been looking for the red signal which was the one at or near the point of this accident, is that right?

A. Yes, sir.

Q. In other words, you knew that there was a signal in the general area, is that right, sir?

A. That's right.

Q. And I suppose that knowledge is based upon your familiarity with this terrain, this area that you rode over before, is that right?

A. That's right.

Q. And you mentioned that you have in the past had considerable experience observing the head brakeman about his work, is that right, sir?

A. Yes, sir.

Q. And will you tell me generally what a head brakeman does with reference to his job about a train?

A. You mean in and about the engine?

Q. Not in and about the engine, but generally in

(Testimony of George E. Maasen.)

connection with freight movements, such as was going on here.

A. Well, he has the duty to see the brakes are not sticking, see that the air hoses are coupled up, see that the air is in—none of the air valves are shut off, see that the air [49] is through all the cars on the head part of the train.

Q. And did any part of the duties entail the climbing of these cars? A. Yes, sir.

Q. And how is that done, is that by ladder?

A. Yes, I guess you would call it a ladder up the side of a boxcar.

Q. I see. In other words, there are these metal handholds that go up the side of the boxcar, is that right? A. That's right.

Q. And I presume his duties also included on occasion setting brakes of boxcars?

A. Yes, sir.

Q. Which are those brakes on platforms located 12 or 15 feet above the track, is that right?

A. That's right.

Q. And this particular run that you were doing I believe is known as the Suisun turn, is that right?

A. Suisun-Roseville turn, yes.

Q. Suisun-Roseville turn. And if I understand it correctly, that means your point of departure is Roseville, you go to Suisun, turn around and go back to Roseville, is that right?

A. Pick up another train and go back to Roseville.

(Testimony of George E. Maasen.)

Q. You indicated that was his regular job, is that right? A. Yes, sir. [50]

Q. How long had you been working it, Mr. Maasen?

A. I believe that was my seventh day on it.

Q. I see. And had Mr. Heavingham been on that job during those seven days that you worked it?

A. He was acting as the head brakeman; I think that was his first trip. He had been acting conductor the week before.

Q. Oh, on the same run?

A. On the same run.

Q. This is a run that occurred how many days a week? A. Six.

Q. And what was your departure time from Roseville, approximately?

A. Approximately—I believe it was 7:30.

Q. P.M.?

A. P.M. I believe that was the time, I'm not sure.

Q. Then you would go down to Suisun, pick up another train and go back to Roseville, arriving back in Roseville about when?

A. Anywheres from seven, eight, nine o'clock in the morning.

Q. I see. A. The following morning.

Q. Out again at 7:30 and repeat the process six days a week, is that right?

A. That's right.

Q. I believe you stated in response to a question

(Testimony of George E. Maasen.)

by Mr. [51] Hepperle that you received burns yourself in this accident, is that right?

A. Yes, sir.

Q. There was some little time elapsed before you were aware of that, was there not?

A. Well, there was some time lapsed before I was aware my legs was burned. I knew my face was burned.

Q. You also burned your legs?

A. Yes, sir.

Q. Well, when did you discover they had been burned?

A. Oh, about the first time I stood still for a couple of moments. [52]

Q. I see. Was that before or after you climbed up on the locomotive for the first time?

A. It was after.

Q. After you had climbed up and turned off the valve, is that correct, sir?

A. Which valve was that, the oil valve?

Q. Yes, sir. A. Yes, sir.

Q. You said, I believe, in response to one of Mr. Hepperle's questions, Mr. Maasen, that you had met Mr. Heavingham before on the Owl, a passenger train, is that right? A. Yes, sir.

A. And was that as a fellow passenger or was he working on the train?

A. No, he was working.

Q. I see. Well, about when was that, if you recall?

(Testimony of George E. Maasen.)

A. Oh, that has been several years ago. I couldn't tell you just how long ago.

Q. Now, during the time that you were at or about the locomotive following this accident, Mr. Maasen, you at no time heard any outcry from the cab of the locomotive, is that correct?

A. No, sir.

Q. Or any sound of a human voice of any kind?

A. No, sir. [53]

Q. Is that correct, sir?

Mr. Martin: I believe that is all I have, Your Honor.

Mr. Hepperle: I have a few questions further, if I may, Your Honor.

The Court: You may.

Redirect Examination

Mr. Hepperle: Q. Are you still suffering from the injuries you sustained in this accident?

Mr. Martin: I will object to that as immaterial, Your Honor.

The Court: The objection will be sustained.

Mr. Hepperle: Q. Can you give us an estimate of the length of this engine and the tender or water tank?

A. Well, I would judge around about 125 feet.

Q. We have spoken of the engine striking a caboose even though the engineer had applied the brakes in emergency. What caboose was this? On another train ahead or what?

A. Another train ahead.

(Testimony of George E. Maasen.)

Q. And tell us briefly what is a caboose? Describe it.

A. Well, a caboose is more or less the office for the conductor.

Q. Describe it as to size, weight, compared with a boxcar, for instance.

A. Well, it is considerable lighter than a boxcar and [54] somewhat shorter.

Q. And where does it normally appear in the train on a run?

A. On the rear of the train.

Q. And was this caboose the caboose at the rear of a train ahead? A. Yes, sir.

Q. Is a head brakeman permitted to run the engine? A. No, sir.

Q. Is he permitted to take away the controls from the engineer? A. No, sir.

Q. Who, under the book of rules and the operating rules of the Southern Pacific Company, is in charge of that engine?

A. The engineer.

Mr. Martin: Your Honor, I think the rules will be the best evidence of that.

The Court: Be sustained.

Mr. Hepperle: Q. Have you, in your thirteen years of experience, ever encountered a situation where the engineer yielded his engine to the head brakeman and permitted him to take it over?

A. No, sir.

Mr. Martin: Your Honor, I will object to that as immaterial, and move the answer go out. [55]

(Testimony of George E. Maasen.)

The Court: The objection will be sustained and the answer may go out.

Mr. Hepperle: In respect to these pictures, Your Honor, may I ask whether Counsel has any objection going to the sufficiency of the foundation laid, or are you willing to stipulate that the foundation is laid. Your objection is on grounds that you so far have stated.

Mr. Martin: Well, as I understand the record, and I can't recall it in detail, Mr. Maasen has testified that this was the engine involved. I will stand on Mr. Maasen's testimony as to foundation, whatever it might be, Your Honor.

The Court: Let's get this cleared up. I think there is a deficiency there in that regard in that there is no testimony to show that these pictures here correctly portray the scene that they are supposed to portray.

Now, there isn't any use in hiding it, get it out in the open, but I haven't sustained the objection on that ground. I will have to, if that matter comes to issue. So I think you should have an opportunity to correct the situation, Mr. Hepperle, and I don't want to have a lot of fuss about pictures or something that can be corrected by calling a witness.

Mr. Martin: If Your Honor please, it has been indicated by Mr. Hepperle that Mr. Maasen has seen these pictures previously and has seen them now. I think the matter could [56] be taken care of by a single question to Mr. Maasen, a general ques-

(Testimony of George E. Maasen.)

tion directed to all the pictures to clear up that deficiency.

The Court: Let's get it out of the way now. A lawsuit shouldn't be won or lost because of technicalities, and it is my opinion that that has not been covered at the present time.

Mr. Hepperle: That is the only reason I asked the question, Your Honor, and in the interests of time, and I appreciate the burden Your Honor has, I merely wanted, in a very simple way, to ask him did he have any objection. If he does, I can bring any number of witnesses.

The Court: Why not just ask Mr. Maasen here, now, if he has looked at all the pictures right here in the courtroom and ask him if those pictures in his opinion correctly portray the scene as he saw it there at the time, or after, or what he sees there; does that correctly portray the scene. I don't know, I can't speak for Mr. Martin, but I will suppose that if he so testified that would be——

Mr. Martin: That would be the end.

The Court: End of that matter.

Mr. Hepperle: May I endeavor to frame the question in the light of Your Honor's suggestion?

The Court: You certainly may. I don't want to bring any witness back here if it can be avoided at this time. [57]

Mr. Hepperle: Q. Mr. Maasen, state whether it is a fact that the pictures now numbered and labeled One to Twelve, inclusive, and Thirteen to Twenty, inclusively, correctly portray what appears

(Testimony of George E. Maasen.)

upon their face and of the right-of-way and of the things shown thereon of the locomotive, area and additional equipment involved in your train and its removal?

A. Generally it is covered as well as I can tell you.

The Court: Well, Mr. Maasen, the only question is: do you see any picture there which is, putting it in plain language, that looked like a phony to you?

The Witness: No, I didn't.

The Court: In other words, what you can see in those pictures there as you remember it is a correct portrayal of what you saw there at the time of the accident?

The Witness: Well, there is a lot in those pictures I didn't see.

The Court: I understand that, but everything you saw there, it is correctly portrayed in these pictures there?

The Witness: Yes.

The Court: Well, now, you say there is a lot in those pictures that you didn't see.

Mr. Martin, is there any question that that is going to enter into it?

Mr. Martin: No, Your Honor, I am willing to accept the [58] witness' statement, and I will not make any objection as to foundation.

The Court: That is behind us, then.

Something else, Mr. Hepperle?

Mr. Hepperle: That is all, Your Honor.

(Testimony of George E. Maasen.)

The Court: Mr. Martin, any recross?

Mr. Martin: Just one question, or two.

Recross Examination

Mr. Martin: Q. Mr. Maasen, when you state that you were down by these tracks immediately after the accident happened, were you ahead of the engine because of the fact you had been thrown out of the window?

A. No, sir, I was just about opposite the engine.

Q. I see, opposite the cab of the engine?

A. Yes.

Q. And in feet how far would you say that was from the cab?

A. Well, I wouldn't want to say. I don't know how much distance between the main line and the siding is. I couldn't even estimate that now.

Q. I see. Well, from your recollection could you state was it in the neighborhood of twenty feet, fifteen feet, twenty-five feet, anything like that?

A. Well, I would say around twenty, twenty-five feet. [59]

Q. Twenty-five feet. Then what did you do, walk up next to the engine and back to get up to the monkey deck? A. Yes, sir.

Q. In other words, you walked up to the cab and walked back and up and over the monkey deck and over, is that correct?

A. I took the flashing of the fire as a target, so-to-say, and walked immediately over there and down the side of the engine to the monkey deck.

(Testimony of George E. Maasen.)

Q. And the flashing of the fire was in the neighborhood of the cab, is that right, sir?

A. Yes, sir.

Mr. Martin: Thank you.

Mr. Hepperle: That is all, Mr. Maasen.

Examination by the Court

The Court: Q. Mr. Maasen, just to clear that up, I think I know the answer, but perhaps some of the jurors don't, and certainly it isn't in the record, the firebox on one of these mallet engines, whatever they call it, is in the front end of the engine as it goes forward, is that not right?

A. Yes, sir. It is just behind the cab.

Q. In other words, to get the matter in ordinary form, it is as though you took the engine itself and turned it around [60] with its face to the tender and the engineer's cab is down the track where you are going instead of back by the tender as it is on most engines?

A. That's right.

Q. And one thing that I think may be helpful to us in the matter, and that is, how many drivers on this engine?

A. I believe there are sixteen.

Q. How many cylinders, let us put it that way.

A. Four cylinders.

Q. In other words, the average engine, or common engine, only have two cylinders?

A. That is right.

Q. And this has twice that many back under the boiler?

A. That's right.

(Testimony of George E. Maasen.)

The Court: Now, in view of what I have asked, anyone else want to ask any other questions?

Mr. Hepperle: Thank you, Your Honor, for having gone into it.

Further Recross Examination

Mr. Martin: Q. Mr. Maasen, is the firebox accessible from the cab?

A. You mean to get to the firebox?

Q. Yes, sir.

A. Yes, sir, inside of the cab there is a fire door.

Q. I see, which opens right into the firebox?

A. Into the firebox.

Mr. Martin: Thank you, sir.

The Court: Anything else?

Mr. Hepperle: Just this, Your Honor. Technically, for the record, in the light of our present record, I make and renew my offer of the photographs One to Twelve and Thirteen to Twenty, each inclusive.

The Court: Well, I have heretofore indicated my ruling. I do not consider at this stage of the case that they have any probative value. I see no reason for modifying the ruling at this time. The objection—I assume you are letting your objection stand?

Mr. Martin: Yes.

The Court: Unless you want to withdraw it, but the objection will be sustained.

Mr. Hepperle: That is all, Mr. Maasen.

The Court: Either one of you want Mr. Maasen to remain?

(Testimony of George E. Maasen.)

Mr. Martin: Not I, Your Honor.

The Court: As far as the Court is concerned, why, you can leave or stay here at your pleasure, Mr. Maasen.

Mr. Hepperle: Thank you. I suggest you take a seat in the courtroom.

(Witness excused.)

The Court: It appears we have reached the usual hour [62] of adjournment. Is there any witness that will be discommoded, that is, any brief witness, that will be discommoded if they return tomorrow?

Mr. Hepperle: There is not, Your Honor.

The Court: All right, we will take the adjournment at this time, Ladies and Gentlemen.

Ladies and Gentlemen of the Jury, we will take an adjournment at this time until ten o'clock tomorrow morning, at which time you will return and we will resume the trial of this case. You will remember the admonition the Court has heretofore given you. You may be excused at this time.

Counsel, I would like you to remain so we can discuss the course of the case.

You may be excused, ladies and gentlemen of the Jury.

(Whereupon the Jury retired from the Courtroom.)

(Whereupon there was a discussion between Court and Counsel pertaining to the length of time of the present trial.)

(Whereupon an adjournment was taken in the above-entitled matter, until the hour of 10:00 o'clock a.m., Thursday, Feb. 3, 1955.)

The Clerk: Heavingham vs. Southern Pacific Company, for further trial.

Mr. Herbert Hepperle: Ready, Your Honor, for the plaintiff.

Mr. Martin: Ready for the defendant.

The Court: Proceed; the jurors are all present.

Mr. Hepperle: May I recall Mr. Maasen for a few questions, Your Honor?

Mr. Maasen, will you come forward, please?

GEORGE E. MAASEN

recalled to the witness stand, previously sworn.

The Court: The record may show this witness has previously been sworn.

Further Redirect Examination

Mr. Hepperle: Q. Mr. Maasen, I neglected to ask you specifically whether or not the fog and darkness continued throughout all of the things that you have narrated and until the time and at the time you left in the ambulance.

A. Yes, sir.

Q. State whether or not it was—what the condition was as to darkness and density of fog during that last period after the accident. [65]

A. Well, the fog was very dense and it was quite dark.

Q. Did your engine have a headlight operating before the accident?

A. Yes, sir.

(Testimony of George E. Maasen.)

Q. State, if you know, what happened to it in the accident.

Mr. Martin: I will object to that as immaterial, Your Honor.

The Court: The objection will be sustained.

Mr. Hepperle: Q. Was there any light around that engine cab or in that area at all, any lights from any source? A. No, sir.

Q. At any time during the period that you have narrated after the accident and your activities in relation to it, were there any lights?

A. No.

Mr. Hepperle: May it be stipulated, Mr. Martin, that Rule 106 of the Southern Pacific Company's rules and regulations of the Transportation Department was in full force and effect prior to and at the time of the accident in question here and that such rule reads as follows—may I read it, Your Honor?

The Court: You may.

Mr. Hepperle: Rule 106:

“The conductor and the engineer and the pilot, if any, are responsible for the safety of the train and the observance of the rules, and, under conditions [66] not provided for by the rules, must take every precaution for protection.

“This does not relieve other employees of their responsibility under the rules.”

Mr. Hepperle: Q. Mr. Maasen, you are and were familiar with this rule at and before the time of this accident? A. Yes, sir.

(Testimony of George E. Maasen.)

Q. Will you tell us what is a pilot?

A. A pilot is an engineer that pilots another train over a territory that the engineer is not familiar with this book of rules.

Mr. Hepperle: Mr. Martin, may it be further stipulated that Southern Pacific Company, Western Division, special instructions No. 5, effective Sunday, September 27, 1953 were in force and effect at the time of and prior to the accident in question, and particularly that portion thereof on page 10 reading as follows:

“All trains must run carefully during and after heavy storms, particularly when the track is apt to be affected. When fog, storms or other conditions obscure track or signals, speed of trains must be so reduced as to permit strict observance of signals and insure safety regardless of time.”

Mr. Martin: So stipulated.

The Court: That is as to both matters? [67]

Mr. Martin: Yes, sir.

The Court: I don't think you answered to the other.

Mr. Hepperle: Thank you, Your Honor.

Q. In your testimony you referred to the fact the Mallet engine after the accident continued to work steam. Tell us how that operates and what sound, if any, is made, and describe the sound, if any.

A. Well, the only thing the steam operated at that time would be the air pumps, which provides air for the brakes throughout the train, and they

(Testimony of George E. Maasen.)

are quite loud, that is, the exhaust from them are quite loud when they are operating, and that is the only thing the steam would operate outside of the escaping steam.

Q. That I will speak of in a moment. Now, tell us about the escaping steam and what sound, if any, came from it.

A. Well, it was quite a noise, the steam escaping.

Q. How far away from the engine were you when you were over at the ambulance which had arrived? Give us a rough estimate of distance.

A. Oh, I should judge it would be around 150 feet.

Q. You testified, and you correct me if I am wrong, that while you were at this ambulance you heard the steam cease.

A. On the way to the ambulance.

Q. On the way to. And did you return then to the engine? A. I did. [68]

Q. And that was the occasion when you got the fusee later on, and so on? A. Yes.

Q. I will not go into it again.

Mr. Hepperle: You may cross-examine.

Recross Examination

Mr. Martin: Q. Mr. Maasen, one matter I forgot to ask you yesterday. What is the meaning of a yellow signal when observed?

A. Well, that is a caution signal to be prepared to stop before reaching the next home signal.

Q. And in this particular case the yellow signal immediately preceding the red signal in effect

(Testimony of George E. Maasen.)

meant be prepared to stop short of the red signal, is that right? A. That is right.

Q. And just one thing, it is a little hard to explain verbally. May I use the blackboard for a moment, Your Honor?

The Court: If it has any bearing upon the case, you may.

Mr. Martin: (At the blackboard) Just taking a track and here is a signal and here is a signal, and the train proceeding in this direction, a yellow signal here would mean that this signal is red, is that right?

A. It would be at that particular time, yes, it would be red.

Q. To a train here with a red signal here means this signal [69] is red (indicating)? And when the signal is red mean this signal is controlled by electrical circuits in the railroad track which would mean that the area between this signal and the next signal is in some way occupied, is that right?

A. That's right.

Q. One other thing. With reference to the duties of a switchman, Mr.—I mean a brakeman, Mr. Maasen, on the road, in addition to the matters we discussed the other day, he also has occasion to throw switches, is that correct? A. Yes, sir.

Q. That is the switches which stand by the tracks to control the movement of trains over those tracks, isn't that right, sir? A. That's right.

Mr. Martin: I think that is all I have, Your Honor.

(Testimony of George E. Maasen.)

Mr. Hepperle: That is all, but I would like him to remain in attendance, Your Honor.

The Court: Very well.

Mr. Hepperle: Plaintiff will call, with Your Honor's permission, Mr. Drisko.

ROBERT D. DRISKO,

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your full name to the Court and jury.

The Witness: Robert D. Drisko, D-r-i-s-k-o.

Direct Examination

Mr. Hepperle: Q. What is your business or profession, Mr. Drisko?

A. I am an actuary.

Q. By whom are you employed?

A. The firm of Coates, Herfurth and England, consulting actuaries.

Q. And where do they maintain offices in this city, if they do?

A. We have an office at 620 Market Street.

Q. Will you tell us something of your training and background and qualifying for this work of being an actuary?

A. I have a Bachelor of Science degree in mathematics from Stanford University. I have taken two years' additional work in actuarial science at the University of Manitoba in Winnipeg,

(Testimony of Robert D. Drisko.)

Canada. I have had two years' work at Massachusetts Mutual Life Insurance Company at Springfield, Massachusetts, and I have been employed with the firm of Coates, Herfurth and England since July 1951.

Mr. Hepperle: Mr. Clerk, will you please mark these three papers as Plaintiff's Exhibits next in order for identification?

(Whereupon the documents referred to above were [71] marked Plaintiff's Exhibits Nos. 21, 22, and 23 respectively.)

Mr. Hepperle: Q. Did you, at the request of my office, Mr. Drisko, prepare Plaintiff's Exhibits 21, 22 and 23 for identification? A. I did.

Q. Will you tell us first what you did in relation to ascertaining the life expectancy for the several people at different ages shown on Exhibit 21, and what you learned?

A. I learned that the life expectancy of three people, a male aged 57 and the female aged 49 and the female aged 10, I found the values for those life expectancies in a book showing the particular expectancies of these years of age.

Q. And what did you find as to their respective life expectancies according to their age; will you tell that?

A. All right. Under the—according to the American Experience Mortality Table, the life expectancies are as follows: For a male aged 57, life expectancy is 16.05 years; for a female aged 49, life

(Testimony of Robert D. Drisko.)

expectancy is 21.63 years; for a female aged 10, life expectancy is 48.73 years.

Q. Did you also ascertain the life expectancies of these people according to another table?

A. I did.

Q. Will you tell us what you did in that regard and what you found? [72]

A. Using the United States Life Table, 1939 to 1941, for white males, a life expectancy of a male aged 57 is 16.98 years. Using the United States Life Table, 1939 to 1941, for white females, the life expectancy of a female aged 49 is 25.54 years; and that for a female aged 10 is 60.85 years.

Q. And tell us why in this instance you used the age 57?

A. The 57 is the nearest year of age of the individual.

Q. Will you turn now to Plaintiff's Exhibit 22 for identification. Did you ascertain the cost of a monthly life annuity, and if so, in what manner?

A. I have two tables. Can you be—let me know which one is which.

Q. Will you take the first one.

Mr. Hepperle: May I consult with the witness a moment, Your Honor?

The Court: You may.

Mr. Hepperle: This one first (indicating).

A. All right. May I have the question one more time, please?

Q. What, if anything, did you determine in re-

(Testimony of Robert D. Drisko.)

spect of the cost of a life annuity for a male aged 56?

A. For a male aged 56, based upon the Metropolitan Life Insurance Company published annuity rates, the cost for \$10 per month for life is \$2,148.18, and the cost——

Mr. Martin: Just a moment, please. Your Honor please, I have before me this document that the actuary is referring to, [73] and this next statement he is going to make I will object to upon the ground there is no foundation in this case for any such computation. I will show you the document that has been supplied me by counsel.

The Court: I do think it is premature at this time.

Mr. Hepperle: You wish us to hold the man here until we get to it? Otherwise, in order——

The Court: Can't you gentlemen agree upon that?

Mr. Martin: I would like to have an opportunity to discuss it with counsel, and, if necessary, with Your Honor.

The Court: The point is that it is something that you ought to be able to calculate with mathematical certainty, and I don't see any occasion for a long harangue here in court about the matter.

Now, one or both of you have the figures, you know what the issue is in the matter, and if there is any question about it I will let you put in both figures on the thing if it is necessary, if you think it is necessary, but you ought to be able to agree

(Testimony of Robert D. Drisko.)

on those two figures, and I think you know what I am talking about.

Mr. Martin: Yes, sir, I agree with that.

The Court: If you want to talk the matter over, if you can do it in a few minutes, all right; if not, we will take a brief recess and give you a chance.

Mr. Martin: Your Honor please, I would like to be heard [74] on this matter, either at the bench or——

The Court: No, I don't want to do any business at the bench. Let the jurors go outside and relax and we will discuss it then.

Ladies and gentlemen of the jury, I don't think I have said this to you, but in cases of this sort there are certain law problems that the Court alone has to determine, and they have nothing to do with the facts that you have to determine. I have frequently used the expression that it is difficult enough for you to segregate the wheat from the chaff, even if we cut the chaff down to a minimum, so I don't think I should call upon you as lay people to determine what is law and what is facts, so under the circumstances I am going to excuse you for a while to discuss this question of law so you won't be burdened with that problem.

I tell you this so you will know there are no secrets going on here behind your back. It is just a matter of procedure, and when we get down to the facts you will have all the facts, but as to the law, that is my burden, and no need for having the jury

(Testimony of Robert D. Drisko.)

try to worry along with something that is my burden.

I will excuse you at this time. You will remain in the immediate vicinity subject to call by the crier, and you will remember the admonition of the Court heretofore given. You may be excused at this time. [75]

(Whereupon the jury retired from the courtroom.)

The Court: The record may show the jurors are outside the courtroom and beyond the hearing of these proceedings.

Mr. Martin: If I may make myself clear on this——

The Court: I know what your point is, Mr. Martin; it comes back to this question of the income tax again.

Mr. Martin: That, and there is another question, too, Your Honor. I don't disagree with Mr. Heperle's figure of \$480 a month, which is one twelfth of his gross annual income for the year 1953, the calendar year immediately preceding his death. However, the measure of damages in this case is not the gross income of the decedent, it is the amount of contribution he could reasonably be expected to make to his family; that is, those dependent upon him: and certainly taking his gross income and capitalizing or buying an annuity to provide his family with his gross income for the rest of his natural life is not the measure of dam-

(Testimony of Robert D. Drisko.)

ages, and I may submit to you there is a case right on that point, Your Honor.

The Court: You don't need to give me any authority. I know what the law is and I don't think any court in the world would hold otherwise that the plaintiff is only entitled to recover the pecuniary value and the benefits that would have come to the surviving heirs of the deceased. It is not based upon what his income was; that is why we get this evidence in here about whether he was generous and loving and a devoted man [76] or whether he was miserly and mean and penurious man.

The first problem I want to cross, are you going to question the rule that the income tax is in or out here?

Mr. Martin: I am going to do that, depending upon the testimony, Your Honor. I intend to cross-examine Mrs. Heavingham upon the amount of contributions she has received in the past. Now, if the testimony is that she has received contributions which, according to my figures, are in excess of what I can show Mr. Heavingham took home each month, I think I am entitled to cross-examine her on that basis, because whether it is subject to income tax or not, the fact is, Your Honor, that past experience on what his contributions had been is some guide to what his contributions would be expected to be in the future.

The Court: Well, but then here, Mr. Martin, is the problem in this case. There is no question that Mrs. Heavingham and Kathleen didn't pay any in-

(Testimony of Robert D. Drisko.)

come tax on the money that was given to them by their husband and father.

Mr. Martin: That is correct.

The Court: And there isn't going to be any income tax on what this jury awards them, if any.

Mr. Martin: That is correct, Your Honor.

The Court: Well, as I see it, the question of income tax is out the window in this case, anyway you want to look at it.

Mr. Martin: Well, I think this: Isn't it—— [77]

The Court: Now, you're going on to the second point. If Mrs. Heavingham testifies that Mr. Heavingham gave her \$600 a month to spend in her household—but that is presupposing something that may never occur.

Mr. Martin: That is correct.

The Court: Obviously, if Mrs. Heavingham suggests she received a lot more money than the records of the company indicate he received, you may cross-examine, pursue that matter to ascertain what other source, if any, he had of income, and if necessary you may show what his take-home pay was from the company. But as a mere showing that his income was X number of dollars less so many dollars, I don't think that is going to assist us any in this case, because as I say, Mrs. Heavingham didn't pay any income tax, nor Kathleen didn't pay any income tax on the money they received, or benefits that they received from the deceased husband and father, and they are not going to pay any income tax on this here now.

(Testimony of Robert D. Drisko.)

So what we are going to have to do is hew down the line, and then I will come to your second point which I think has merit, that the only issue in this case is how much benefit could Mrs. Heavingham and Kathleen reasonably expect to have received in dollars and cents. Now, isn't that the issue?

Mr. Martin: That is right, Your Honor, and I submit capitalizing his gross income is certainly——

The Court: I am going to agree with you on that; I think [78] you are absolutely right on it, and I don't think—I think the figure would tend to confuse the jury, and I think I am going to suggest, Mr. Hepperle, it be revamped in some fashion, or break it down. I don't know whether this—what is the \$10 here, is that a unit you could use all the way up, or is it different?

The Witness: No, that is a unit.

The Court: So that actually, then, \$460 per month is simply 46 times \$2,148.18?

The Witness: Rounded to the nearest dollar.

The Court: Yes.

The Witness: Correct.

The Court: Well, isn't that the end of the line?

Mr. Martin: That is why I made my objection at the time I did.

The Court: I think it is entirely proper you should have. I want to get the air cleared from this particular situation. I want both sides to know what my position is going to be. Did you have something more, Mr. Hepperle?

Mr. Hepperle: I agree exactly with what Your

(Testimony of Robert D. Drisko.)

Honor has said. I want to make one suggestion, however, that as Your Honor has done it and will do it again and again in the future with your instructions to the jury, will take care of every item because we take no different position as to the law than Your Honor has so ably stated. The thing is that what our [79] people are entitled to on the earnings business is what you said, the contributions, I meant, but to have this before them and have Your Honor say it, and we both can argue it, it is only contributions and it is only upon that theory that I proffer this at all. I suggest it is better this way and better for the record if Your Honor handles it in the instructions, as I am sure you will. [79A]

The Court: Well, I propose, in my instructions, to point out the law as I understand it to be, and as I have indicated here that it is only the cash value of the contributions that Mrs. Heavingham will have received and Kathleen would have received up to the age of her majority or up to the time that she was married.

First I suggested the other day that I am not well. There is no need getting in that as it has no bearing upon this case here. But these things are all very nebulous in character and when you have to depend on the common sense and good judgment of those 12 ladies and gentlemen who are jurors here and trying to figure out as best they can what will correct the situation that is complained of here, and put it in dollars and cents,—which is ex-

(Testimony of Robert D. Drisko.)

tremely difficult but nevertheless that is the way our law courts operate—then we have to do it that way.

Mr. Hepperle: In that connection I think it will be clearer and better if the jury hears it all from Your Honor as to what the measure is.

The Court: All right. Then it's my intention too; I think you should stop at this unit of \$10 per month because that gives you something to argue from.

Mr. Hepperle: Very good, Your Honor.

The Court: Then if you think that Mrs. Heavingham got \$400 per month it is simply forty times that amount. If Mr. [80] Martin wants to argue that she only got \$100 a month, it's an argument.

Mr. Hepperle: An excellent suggestion.

Mr. Martin: Well, of course, I don't agree, Your Honor, with the theory that the only basis for the jury is the cost of an annuity from the life insurance company.

The Court: Well, in other words, I am not going to hold you to that. You can argue anything you want on the thing from that standpoint. But so far as these figures here are concerned, personally, I think again that I disagree with this rule that has been laid down, but I am not the one who makes these laws. The people upstairs tell me what the law is. And they have stated that one of the bases for determining these matters is an annuity furnished by a reliable insurance company.

Mr. Martin: I understand that, Your Honor.

(Testimony of Robert D. Drisko.)

The Court: Well, I think it's an extremely unfortunate rule because I think it should be a representative group of insurance companies at the very least. In addition to that, I think it has its vice in that it provides for a profit and loss and that sort of thing, in a company that is operating—but that is not for me to say. When the Circuit Court speaks, that is the rule that I have to go by, and they have spoken in that regard, in my opinion.

So you can argue whatever you want to about the matter. [81] I am not going to stop you on that. But I am going to permit that evidence to come in because I think that is what the Circuit Court says is permissible.

Is there anything else you want to take up?

Mr. Martin: I can think of nothing further.

Mr. Hepperle: I think that catches it, Your Honor.

The Court: All right. Then you can call the jury in. I might say that it is my policy not to permit the documents in evidence. You may have the witness testify, but the documents will simply stand for identification, so that you have it in the record. As I believe the witness' testimony may not be reduced to writing, any witness, and this is no exception.

Mr. Hepperle: Thank you very much, Your Honor.

The Court: Well now, are we going to go into any of the figures here about income at this time or is that going to be abandoned for the time being?

(Testimony of Robert D. Drisko.)

Mr. Hepperle: I think the income business will be a matter of record from only their organization.

The Court: I just wanted to know if you wanted any more time on that.

(Thereupon the Jury returned to the court room.)

The Court: The Jurors are now returned to the court room. We may proceed.

Mr. Hepperle: Q. We have reached the point, Mr. Drisko, [82] in respect of the cost for ten dollars per month for life, of a male aged 66, of an annuity, based upon the Metropolitan Life Insurance Company annuity rates. I intended to say 56. If I didn't that is the figure.

The Court: Well, actually, what he testified was 57, Mr. Hepperle.

Mr. Hepperle: In the other one, Your Honor, but this is a particular one he has to take.

The Court: Oh, I am sorry, the age he said that he had ascertained was 57 because it was the nearest birthday. Isn't that what you said?

The Witness: That was on the first bit of evidence.

The Court: Yes. But that is what you did say originally?

The Witness: That's right.

The Court: All right. Then that is for the life expectancy.

Mr. Hepperle: Thank you, Your Honor.

Q. Now, this cost for \$10 per month for life is \$2,148.18—will you explain in simple terms how you

(Testimony of Robert D. Drisko.)

would ascertain using that base figure for a cost of, cost for \$400 per month for life?

A. You divide the \$400 per month by the \$10 per month and you get 40 units of \$10 per month for life, multiply the figure given by forty.

Q. Now, will you turn to your additional exhibit in paper, [83] this one, did you determine the present value of various sums of money in relation to the age 57? Tell us what you did in that regard, if anything?

A. For age 57 I calculated the present value at two and one-half per cent rate of interest, and 3 per cent to provide for 460.

Mr. Martin: Your Honor, I am going to object to that again, upon the same basis I did on the other matter. We are speaking about specific figures here.

The Court: Yes. I think this should be broken down in the same fashion before you can do that, Mr. Drisko.

The Witness: I have it on my worksheet.

Mr. Hepperle: Excellent.

The Court: Well, then, go ahead.

Mr. Hepperle: Q. Tell us what you have on your worksheet. You explain it to me and the Court and Jury and counsel in your own way.

A. First of all, the definition of present value, if I may read it, "Present value may be defined as the sum of money which if invested or deposited in a trust or bank would be just sufficient to provide the monthly payments for the period stated.

(Testimony of Robert D. Drisko.)

provided that the interest on the balance in the account was credited each year at the rate shown, and at the end of that period both principal and interest would be exhausted. The life [84] expectancy of the person age 57 is found to be 16.05 years, the present value to provide one dollar per month for 16.05 years at an annual interest rate of two and a half per cent, is \$158.65.

Q. Would you stop there for the moment? Now in order to calculate what it would take in the form of present value to provide, say, \$400 per month, how would you go about using that base figure to ascertain that sum?

A. You would have to multiply the \$158.85 by the \$400, by the four hundred, since it is four hundred units, which you are talking about.

Q. Now was the life expectancy you spoke of in this instance based on age 57 and according to the American Experience Table?

A. It was.

Q. Did you also ascertain at the same age for white male age 57, what it was under the other table?

A. The value under the United States Life Table is, 1939 to '41, for white males is 16.98 years for a person aged 58.

Q. Now, can you similarly give us in relation to this last computation, using an annual interest rate of 3 per cent, did you get a base figure?

A. I do. The present value to provide one dollar

(Testimony of Robert D. Drisko.)

per month for 16.05 years at an interest rate of 3 per cent is \$153.16.

Q. And it of course can be used just like the other in figuring on a larger sum, such as, for instance, present value [85] to provide \$400 per month for the 16.05 years, or under the other table, the 16.98 years life expectancy?

A. The figure is for the 16.05 years. You do a similar sort of thing for the 16.98 years, but it has not been computed.

Q. That is all right. But all I meant was that, so the record would show, that you had a base figure at the two and a half per cent rate, you now have given us a base figure at the three per cent rate, right? A. That is correct.

Q. Secondly, in relation to the two and a half per cent figure, you showed how that could be used to find a return for, say, \$400 per month?

A. That's right.

Q. And all I want is the record to show that the same method of computation can be used at the three per cent rate? A. That is correct.

Mr. Hepperle: You may cross-examine. Oh, pardon me. May I formally offer these merely—in line with Your Honor's ruling they become part of the record for identification?

The Court: They may be marked for identification only at this time. Plaintiff's Exhibits 21, 22 and 23, respectively.

Mr. Hepperle: Thank you, Your Honor.

(Thereupon the documents referred to were

(Testimony of Robert D. Drisko.)

marked for identification only as Plaintiff's Exhibits Nos. 21, 23 and 23.) [86]

Cross-Examination

Mr. Martin: Q. Mr. Drisko, in your computation I see you have been using a life expectancy which you have obtained from certain tables, is that correct? A. That is correct.

Q. So therefore when you use an age 57 with a life expectancy of 16.05 years, you are carrying the return then to the individual's age of 73; is that right, sir? A. That is correct.

Q. And in other words, your basic assumption then is an income of so much a month until age 73?

A. The basic assumption is the income for his expected lifetime, which happens to be to age 73.

Q. You know, of course, of your own knowledge, that more frequently than not people do not engage in active physical labor to age 73, do you not?

A. I would say they did not.

Q. Yes. Now, you have given us two different modes of computation here, one on an annuity which is purchased from a life insurance company, as I understand it, and one on a present value of a future sum of money, is that correct?

A. That's right.

Q. In other words, if one should go down to a life insurance company and say, "I want 'x' number of dollars per month for so many years for the rest of my life." the life insurance [87] company

(Testimony of Robert D. Drisko.)

would sell him an annuity which would cost him so much under this method you have testified; isn't that correct? A. That's correct.

Q. The cost of that annuity would exceed the present value of a sum of money for that same period of time, wouldn't it?

A. Will you repeat that again, please?

Q. I say, the cost of the annuity from a life insurance company would exceed by a considerable margin the present value of that sum of money, according to your tables, isn't that right?

A. I would say so, that is right.

Q. And that is because the insurance company is charging you profits and that same type of thing in your cost of an annuity, isn't that so?

A. That is one of the reasons, yes.

Q. And if a person should go out on the open market and buy a government bond, for instance, of 3 per cent, he could buy so many government bonds now and hold those bonds and assure himself of an income of so much a month for the balance of his lifetime or for whatever period he wanted to, couldn't he? A. He could.

Q. And he wouldn't have to go through an insurance company and have the insurance company's charges charged against him, would he?

A. He would not have to do that. [88]

Q. And Mr. Drisko, these present values of future sums of money that we have been talking about are contained in tables, aren't they?

A. They are.

(Testimony of Robert D. Drisko.)

Q. In other words, as I understand it, say on an annual basis you want an income of so much per year for a given number of years, say, ten years, you can consult the tables and get a factor, can you not, which will tell you how much to multiply the annual sum by to assure yourself that sum for a given number of years?

A. If you are specifically interested in a complete or integral number of years and also yearly payments rather than monthly payments, you can do that. There is one figure you can use, yes.

Q. Yes. I have here what I believe is such a table, Mr. Drisko, which is called Present Value of Annuity. I will ask you if that is the type of table we are just referring to?

A. That is the type, yes.

Q. Yes. Now,—excuse me one moment—assume for instance, that an individual aged 57 is going to work until age 65, that is a period of about 8 years, is that right? A. That is right.

Q. Can you tell me from this table what the factor would be for 8 years at 3 per cent.

A. The factor to provide one dollar per year for the 8 years [89] at 3 per cent is 7.0196922.

Q. And so we understand one another, if for instance, we wanted to assure an income for the next 8 years on an annual basis of, say, \$3,000 annually, you would multiply that \$3,000 by 7.0196922; is that right? A. That is correct.

Q. And to round it off in round figures, something like 7.0102?

(Testimony of Robert D. Drisko.)

A. Well, normally, I would use all of it and round off the answer to the nearest dollar.

Q. I see. Now, say we take the factor nine years at 3 per cent. What is the factor we get for that, that would be to age 66?

A. Nine years, 3 per cent, the factor is 7.7861089.

Q. And for ten years to age 67, what factor do you get? A. 8.5302028 at 3 per cent.

Q. And for 11 years to age 68, what figure do we get?

A. Eleven years is 9.252624. It's light here.

Q. For 12 years at 3 per cent, that would be to age 69?

A. For that last one, for the 11 years, there is a light place. It isn't printed in the book.

Q. Well, you only have to take it to the fourth place.

A. For 12 years, it's 9.9540040.

Q. And for 13 years to age 70, what would that be? A. 13 years. It's 10.6349553. [90]

Q. Now, of course, that is assuming a rate of return of 3 per cent, is that right, on the investment? A. That is correct.

Q. And can you give me the respective figures for 8, 9, 10, 11, 12, and 13 years for four per cent?

A. Four per cent, starting with 8 years, why, yes. Four per cent, 8 years is 6.7327449; 9 years is 7.4353316; 10 years, is 8.1108958; 11 years is 8.7604767. What was that last one that you wanted?

Q. Twelve years and 13.

A. Twelve years is 9.3850738.

(Testimony of Robert D. Drisko.)

Q. And 13 years to age 70 would be what?

A. Thirteen years is 9.9856476.

Q. And then one more. Let's take it at 5 per cent for those same years?

A. Five per cent, eight years, is 6.4632128; 9 years is 7.1078217; 10 years is 7.7217349; 11 years, 8306—pardon me—8.3064142; 12 years is 8.86432516; 13 years at 5 per cent is 9.3935730.

Q. All right; now, you mentioned in one of your—in response to one of the questions put to you by Mr. Hepperle, that you defined present value and that sum, as I recall it, roughly, is the sum of money which if invested in a bank or trust would bring in a stated income for a definite period of time using both income and capital, is that correct? [91]

A. That is correct.

Q. So that at the end of that period of time there would be nothing remaining in the fund?

A. That is right.

Q. Now, you are familiar, are you not, that there are such things as investment trusts?

A. I am familiar with that, yes.

Q. And you are familiar with the fact that their history over the past 20 years shows a return and income of about 4.9 per cent?

A. I am not familiar with that, no.

Q. You are not familiar with that. Are you familiar with the fact that building and loan associations, which have government guarantees of funds deposited thereby, are returning about four and a half per cent on income?

(Testimony of Robert D. Drisko.)

A. It is my understanding that it depends on the particular guarantee that the government had. They vary somewhat between three and a half to perhaps—I have never seen it at four and a half—but four per cent, I have.

Q. Three and a half and four. And, of course, investment trusts, as you know, have widely diversified investments, is that correct?

A. I would imagine that they do, yes.

Q. Yes. They in turn invest this money in bonds and stocks and they have a managing board which controls the investment [92] and where the money shall be put under that, a board of experts to take care of that?

A. I would imagine that there would be, yes.

Q. So that the person investing in the investment trust has nothing to do with the management of the funds in the trust? A. That is right.

Mr. Martin: I believe that is all I have at this time, Your Honor.

Redirect Examination

Mr. Hepperle: Q. Mr. Drisko, have you and your firm had occasion to make studies and determinations of the rate of interest at which funds can be safely invested?

A. Our firm does set up pension plans for various businesses and for various city and county and state funds, and in that we take as a basis of the interest rate used what they consider to be a safe investment rate for other people's money.

(Testimony of Robert D. Drisko.)

Q. State, if you know, what that rate is?

A. The rates vary between two and three per cent. Generally two and a half seems to be the most popular rate.

Q. Counsel asked you in regard to the cost of the Metropolitan Life Insurance annuity whether that cost didn't include profits to the concern and you said that was one of the reasons. Will you tell us more what the other reasons are and describe that a little bit? [93]

A. One of the very important reasons would be the fact that they use an up-to-date life expectancy. The one quoted from the American Experience Table was devised back in 1868. Since that time there has been considerable improvements. The insurance companies all have them, use up to date values for life expectancy. They also use interest rates perhaps even lower than those quoted.

Q. You used the phrase "there has been considerable improvement." In what regard? Would you explain that please?

A. Well, as far as lifetime expectancy of number of years lived in 1868, as you can see, just looking at two of the figures I gave, in the 1868 one, which was the American Experience Table for the person aged 10, the life expectancy was another 48.72 years beyond age 10 back in the 1868 table. The 1939 to '41 table, it was up to 61.85 years beyond age 10. The 1931—'39 to '41 United States Life Tables are still not as high values as the ones

(Testimony of Robert D. Drisko.)

used by the insurance companies for their annuity rates.

Mr. Hepperle: That is all.

Recross-Examination

Mr. Martin: Q. So we can get this clear, Mr. Drisko, the figures you are using are based on full life expectancy and not work expectancy; isn't that correct? [94]

A. The figures whenever I mentioned life expectancy, that is right, full life expectancy.

Mr. Martin: Thank you.

Mr. Hepperle: That is all, Mr. Drisko.

(Witness excused.)

The Court: We will take the morning recess at this time. Ladies and gentlemen of the Jury, you will remember the admonition the Court heretofore has given you. We will take a brief recess.

(Short recess.)

The Court: Jurors are all present. You may proceed, gentlemen.

Mr. Hepperle: May I confer with counsel a moment, Your Honor?

The Court: You may.

Mr. Hepperle: We have here the question, Your Honor, that relates to tax. I have the official withholding statement from the Southern Pacific Company. I wish at this time to offer the total wages before payroll deductions paid in the years 1952 and 1953 respectively.

Mr. Martin: In line with our previous discussion, Your Honor, I am going to object to it unless I can show what the net was after deductions.

The Court: Well, I think under the circumstances in this case here I will permit the showing of both figures for the reasons I have heretofore indicated.

Mr. Martin: Very well, Your Honor.

The Court: If you desire to put it in, I will let you put it in, Mr. Hepperle, but it will be understood that the matter may be gone into as to the net.

Mr. Hepperle: Then, if Your Honor please, without waiving the point, I think perhaps the best way would be if I put in my evidence and let him put his up. Thank you.

The Court: All right.

Mr. Hepperle: It is stipulated between the parties, Your [96] Honor, that the plaintiff's decedent, Arthur V. Heavingham, was paid in the year 1952 by his employer, the Southern Pacific Company, before payroll deductions, \$5,722.01, and in the year 1953 he was paid, before payroll deductions, the sum of \$5,574.34.

Is it so stipulated?

Mr. Martin: Yes.

Mr. Hepperle: Mrs. Heavingham, will you take the stand, please?

MARY V. HEAVINGHAM,

the plaintiff herein, called in her own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Mary V. Heavingham.)

Direct Examination

Mr. Hepperle: Q. Will you please state your name? A. Mary V. Heavingham.

Q. And your address?

A. 617 Wagner Street, San Lorenzo.

Mr. Hepperle: Counsel stipulates, Your Honor, that Mary V. Heavingham is the duly appointed and acting special administratrix in the matter of the estate of Arthur V. Heavingham, deceased, and as such is the legal representative in whose name and through whom this action is being maintained.

Mr. Martin: So stipulated, Your Honor. [97]

The Court: Very well.

Mr. Hepperle: That will save us that.

Mr. Clerk, will you please mark this as plaintiff's exhibit next in order for identification?

(Whereupon photostatic copy of marriage certificate was marked Plaintiff's Exhibit No. 24 for identification.)

Mr. Hepperle: Counsel stipulates, Your Honor, that there may be received in evidence Plaintiff's Exhibit No. 24, being a photostatic copy and certified copy of a marriage return setting forth the detail of the marriage of the deceased Arthur V. Heavingham and Mrs. Mary V. Heavingham.

Mr. Martin: So stipulated.

The Court: Wouldn't it be easier to stipulate that Mrs. Heavingham is the surviving widow of Mr. Heavingham?

Mr. Martin: Certainly.

Mr. Hepperle: I would like that, Your Honor.

(Testimony of Mary V. Heavingham.)

The Court: The only reason I suggest that, there isn't any question about that, or that Kathleen——

Mr. Martin: None at all.

The Court: ——is the surviving daughter.

Mr. Hepperle: Thank you, Your Honor.

The Court: Get to it that much quicker.

Mr. Hepperle: Then may I state preliminarily, I could do it through the witness but our figures will be more quickly, [98] I think, presented, that Mr. Arthur V. Heavingham at the time of his marriage was 23 years of age, that Mrs. Heavingham's age at that time was 18.

The Witness: That's right.

Mr. Hepperle: Q. What was your husband's birthday? A. June 4, 1897.

Q. And your own?

A. January 9, 1905.

Q. What was Kathleen's birth date?

A. February 12, 1944.

Q. And I, of course, am referring to your daughter Kathleen. When and where were you and your husband married?

A. We were married in Tacoma, Washington, 1923.

Q. And tell us in a brief way what his occupation was.

A. Well, at that time he was doing a little gardening for a gardener there.

Q. And did you remain in that area or did you go somewhere else?

A. Well, we came to Chico, California.

(Testimony of Mary V. Heavingham.)

Q. And was he employed there? A. Yes.

Q. By whom, if you please?

A. Well, I don't remember the name, but he worked for the Diamond Match Company.

Q. What did he do for them, if you recall? [99]

A. He worked in the lumber department.

Q. Later on did he do some other kind of work?

A. Yes, we came to here, to Oakland, and he was in the plastering business for a long time.

Q. Can you give us a rough estimate as to how long he was in the plastering business?

A. Well, I don't exactly remember, but he worked also for a laundry, he drove that laundry truck for seven years, too.

Q. And the plastering business, was it plastering such as in relation to building houses, and that sort?

A. Houses and buildings, large buildings.

Q. State whether or not in that work he also, in his preliminary years at least, carried mortar and plaster in what——

A. That is right.

Q. ——they call a hod-carrying apparatus?

A. That is right. If they didn't have a mixer, and he carried it up the ladder.

Q. How tall was he, about?

A. About six feet.

Q. And about what did he weigh at the time of his injury and death? A. About 165.

Q. State whether or not he was strong or otherwise. A. He was strong.

Q. And what, at the time—shortly prior to and

(Testimony of Mary V. Heavingham.)

for some [100] period before was his state of health, prior to this accident?

A. Well, you mean this last——

Q. Yes.

A. Well, he had improved a lot, and he was all right.

Q. Was he in good health? A. Very good.

Q. On the February date of this accident?

A. Very good health.

Q. About when, if you know, did he come to work for the Southern Pacific Company?

A. It was in 1942.

Q. And in what capacity did he gain employment with them? A. As a brakeman.

Q. State whether or not he continued to work as a brakeman and was employed as a brakeman at the time of his death. A. Yes, he was.

Q. Did he have any other jobs other than that for the Southern Pacific during this period from 1942?

A. No, except being a conductor part time.

Q. Yes, we refer to a brakeman and I am sure counsel and I understand, and I am a little remiss, perhaps, but beginning in 1942 your husband gained standing and seniority, did he not?

A. That's right.

Q. And he came to a point where he held, by seniority rights, the right to operate as a conductor, right? [101] A. That's right.

Q. State, if you know, whether he worked as both a freight and passenger conductor?

(Testimony of Mary V. Heavingham.)

A. That's right—no, I beg your pardon, he didn't work as a passenger conductor.

Q. He didn't have enough rights on that?

A. No.

Q. Had he been mostly in freight service?

A. Yes.

Q. Who handled his pay checks?

A. Well, he brought it home and we usually went together and cashed it.

Q. And what was it devoted to, the proceeds?

A. Well, most of it went to the home, the family.

Q. Tell us in your own way what sort of husband and father was he?

A. (Witness breaks down and starts crying.)

The Court: Would you like a little recess?

The Witness: Please.

The Court: You'd better step down, please.

(Witness leaves the stand.)

The Court: Ladies and gentlemen, we will take a brief recess at this time. Remember the admonition of the Court heretofore given. Or do you want to continue with another witness, Mr. Hepperle?

Mr. Hepperle: I think she'd better compose herself. We are going to move pretty fast.

The Court: Then we will be at recess briefly. Remember the admonition of the Court heretofore given.

(Short recess.)

Mr. Hepperle: Resume the stand, please.

The Court: The jurors are all present. You may proceed.

(Testimony of Mary V. Heavingham.)

(The witness resumed the stand.)

Mr. Hepperle: If I may, I should like permission to withdraw that question I last asked and I will, by question and answer, move more quickly and more satisfactorily.

The Court: Very well.

Mr. Hepperle: Q. Was Mr. Heavingham a family man? A. Yes, he was.

Q. Did he provide you with a home, that is, one that you bought and owned? A. Yes, he did.

Q. And is it the one you were in at the time of his accident and death? A. That's right.

Q. State whether or not he was a kind and agreeable father. A. He was.

Q. Was he interested in his family and in his children in respect of their activities?

A. Very interested. [103]

Q. What, if anything, did he do in becoming president of a club or organization on any occasion?

A. Well, he was very interested in the child welfare.

Q. Did he become an officer in a group over there? A. Yes, he was president.

Q. What is the name of that group?

A. President.

Q. Pardon?

A. President, Laurel Dads' Club.

Q. And what was the function of that club, what did he have to do with it, and what, precisely, was the work of the club?

(Testimony of Mary V. Heavingham.)

A. Well, they solicited the members to have a large club, and the dads all got together and gave dances—to raise money for the children.

Q. In other words, the name Dads' Club implies what it was, it was an organization for the benefit of children? A. That's right.

Q. In what way did they do things for the children?

A. Well, they—the money that they made they gave to—went for books and things that—special books that otherwise they wouldn't have had, and the milk fund, and so forth.

Q. Did I understand you to say milk fund?

A. Yes.

Q. Which went to needy children, I assume.

A. Yes. [104]

Q. With respect to going on picnics, was that a situation in your family? A. Yes, it was.

Q. Was that frequent or otherwise?

A. Quite frequently, whenever he was home.

Q. And what about trips to the snow country?

A. Yes, he done that, too.

Q. And tell us who would all go, and so on.

A. Well, the whole family went.

Q. Later on, as your older children grew up, state what the family relationship was with them; did you entertain each other, were you together? Just tell us briefly how.

A. Yes, we did. As soon as he would get home, why, he would be on the phone calling to come over.

Q. What would you folks do?

(Testimony of Mary V. Heavingham.)

A. Well, have barbecues and dinners.

Q. Did you have any—let me ask you this: Did he spend any time with your little daughter Kathleen?

A. Why, yes, he did.

Q. State whether his affection was warm and extensive in relation to her.

A. It was very.

Q. What, if anything, did he do in keeping her company and advising her, and that sort of thing?

A. Well, they watched television together, and, oh, just about [105] everything.

Q. Did they go places together?

A. Yes.

Q. Did he supply her with any money?

A. He always gave her an allowance.

Q. In addition to that did he have a special way of furnishing her with change and that sort of thing?

A. He always saved his small change for her.

Q. Did he, in your presence and hearing of the family, talk with Kathleen and guide and counsel her?

A. Yes, he did.

Q. As Mr. Heavingham's seniority and his earnings on the railroad increased, did you begin to have more and more in the way of a better life?

A. Yes, we bought a better house.

Q. Is it the fact that as his seniority grew he was able to hold better runs than before?

A. Well, yes.

Q. And work more often than before?

A. Yes.

Q. Was that a continuing up-grade thing in

(Testimony of Mary V. Heavingham.)

relation to both the kind of run he could hold and the kind of money he could earn up to the time of his death? A. Yes, I believe so.

Mr. Hepperle: Mr. Clerk, will you please mark this as [106] Plaintiff's Exhibit next in order for identification?

The Court: We have a problem on that. The marriage certificate, did you withdraw that or not?

Mr. Hepperle: I didn't, Your Honor, but I would just as soon.

The Court: Doesn't make any difference to me; just like to keep the record straight.

Mr. Hepperle: I will leave it in, Your Honor.

The Court: It will be marked 24 for identification, and this picture will be marked 25 for identification.

Mr. Hepperle: Thank you.

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 25 for identification.)

Mr. Martin: Your Honor please, there is one thing in connection with that birth certificate that I noticed on its face just a few moments ago; before it goes in could we discuss it?

The Court: It isn't in evidence, it is only for identification.

Mr. Martin: Oh.

The Court: And I assume from what Mr. Hepperle said he isn't going to offer it.

Mr. Hepperle: Not in the light of the stipulations, Your Honor.

(Testimony of Mary V. Heavingham.)

The Court: That's what I understood.

Mr. Hepperle: Yes, Your Honor.

Q. Mrs. Heavingham, I show you Plaintiff's Exhibit No. 25 [107] and ask you if that is a correct photograph—— A. Yes, it is.

Q. ——of the persons, true and correct of the persons that are shown thereon?

A. Yes, it is.

Mr. Hepperle: We offer in evidence Plaintiff's Exhibit No. 25.

Mr. Martin: Who are the persons shown?

The Court: I don't know who it is.

Mr. Hepperle: I thought I would get at it this way, or this way.

Q. First, who is the gentleman shown in the picture? A. Mr. Heavingham.

Q. Your husband? A. Yes.

Q. And who is standing immediately next to his left? A. My eldest daughter.

Q. And then who is next to her?

A. Myself.

Q. And who is the little girl?

A. Kathleen.

Q. Can you tell us the occasion on which this picture was taken?

A. That was taken at my daughter's wedding.

Q. And the daughter who is shown here as the older daughter——[108] A. Yes.

Q. ——in the picture? A. That is right.

Mr. Hepperle: I now renew my offer of Plaintiff's Exhibit 25.

(Testimony of Mary V. Heavingham.)

The Court: Let it be received and marked Plaintiff's Exhibit 25.

(Whereupon the photograph referred to above was received in evidence as Plaintiff's Exhibit No. 25.)

Mr. Hepperle: May I just hold it up a moment before the jury?

The Court: You may, or they may have it in the jury room.

Mr. Hepperle: If I could take just a minute.

The Court: All right.

Mr. Hepperle: Can you folks see that? (Showing picture to the jury.)

Mr. Hepperle: You may cross-examine.

Cross-Examination

Mr. Martin: Q. I will be as brief as I can, Mrs. Heavingham.

Mrs. Heavingham, during the time that your husband was working with the Southern Pacific Company, was your home always in and around Oakland? A. Yes.

Q. And Mr. Hepperle mentioned that you have grown children of [109] this marriage, is that correct? A. Yes, that's right.

Q. And they, in 1954, were not a part of your household, is that right? A. That's right.

Q. They had married and left the home?
A. Yes. [109A]

Mr. Martin: Q. Now, I believe you said, Mrs.

(Testimony of Mary V. Heavingham.)

Heavingham, that your husband worked principally in freight service, is that correct?

A. Mostly, yes.

Q. And as both a freight brakeman and a conductor, is that right? A. Yes.

Q. And in connection with that service, Mrs. Heavingham, it was frequently part of his job to be away from home, is that right?

A. That's right.

Q. In other words, as a matter of fact, at that time he was working when this accident occurred, he was based in Roseville, is that right?

A. Yes.

Q. And that is not unusual in Mr. Heavingham's history with the Company, is that right?

A. That is right.

Q. Would you say that he was based away from home about half the time?

A. Well, he wasn't on this particular run. He was away from home a lot.

Q. And he held this job before, had he?

A. Well, it was just several months. I don't know exactly how many, maybe three or so. [110]

Q. And he had held similar jobs where he was based away from home in the past, is that correct?

A. Well, not too much. Mostly home a couple of days or something.

Q. You say mostly he would be home a couple of days? A. Usually.

Q. And then he would be away on the road for five days a week, is that right?

(Testimony of Mary V. Heavingham.)

A. No. I mean he would be out a couple of days and maybe home again and then out again.

Q. I see. However, on the particular job he was doing at this time that we are concerned with, he was out for five days at least a week, is that correct? A. Yes.

Q. And what I am trying to get at, Mrs. Heavingham, is in the general course of his work with the Company, there were frequent occasions when he would be out for periods of several days, is that correct? A. On this particular job, yes.

Q. And on other jobs he had held before, is that right? A. Yes.

Q. And during those times he would live in a hotel wherever he was, is that correct?

A. Yes.

Q. And presumably take his meals wherever he was, is that correct? [111] A. Yes.

Q. And I believe you stated, Mrs. Heavingham, that your husband ordinarily would bring his check home and you would cash it together, is that right?

A. Yes.

Q. And then he would take from the bank, I presume, whatever he required for his personal expenses, is that right?

A. Well, he would always ask me for what money he needed.

Q. I see. But he did take sums of money for his own personal expenses such as meals, clothing, and that type of thing, is that right?

A. That's right.

(Testimony of Mary V. Heavingham.)

Q. And would you say that that sum of money would average, say, a hundred dollars a month?

A. I don't think so. I never kept track of it, but I don't think he ever——

Q. Could it have averaged a hundred dollars a month?

A. Well, I don't think it would be that much.

Q. When he was working, even when at home, he would eat away from home, is that correct, while on the job?

A. While on the job, yes.

Q. And do you recall, Mrs. Heavingham, about what the average pay check was for, say the year, the average pay check that he brought home for the year 1954 or '53, I beg your pardon? [112]

A. Well, I guess it was about four hundred and sixty. I don't know because they varied. I didn't stop to figure it out.

Q. I see. Let me ask you this: Would it be correct to say that his average take-home pay, the check that he cashed at the bank would run around \$375 a month?

A. Well, sometimes it was that.

Q. I am speaking of the whole year of 1953?

A. Well, like I said, I didn't you know, figure it out.

Q. But would that figure seem unreasonable to you as an average?

A. Well, lots of time it was more, sometimes less.

Q. Oh, I understand. Specific checks varied. But I am trying to get it based for the whole year, Mrs.

(Testimony of Mary V. Heavingham.)

Heavingham, and if I were to tell you that or to suggest to you that it was around \$375 average per month——

A. Well, it could be.

Q. So that we are clear on this, Mrs. Heavingham, the expense Mr. Heavingham did draw on occasion, regularly, were sums of money for his own use, personal use, is that correct?

A. Well, I always gave it to him, whatever he asked.

Q. And out of the balance you ran the house, is that correct? [113]

A. Yes.

Q. And provided the food for the family?

A. Yes.

Q. And I suppose both he and you bought the clothing for him, is that right?

A. That's right.

Mr. Martin: I believe that is all that I have at this time, Your Honor.

Redirect Examination

Mr. Hepperle: I shall be very brief, Your Honor.

The Court: Very well.

Mr. Hepperle: Q. In respect of your husband's character and personality and so on, was he a frugal saving person or not?

A. Yes, he was.

Q. While I appreciate you can't give us figures and Mr. Martin understood that in his questions, I want to ask you in the light of his own questions, would you say that practically everything your husband made went for yourself and your family?

(Testimony of Mary V. Heavingham.)

A. Just about.

Mr. Hepperle: I think that is all.

Mr. Martin: I have nothing further, Your Honor.

Mr. Hepperle: You may step down.

(Witness excused.)

Mr. Hepperle: Mr. Clerk, will you please mark this as Plaintiff's Exhibit next in order for identification?

May it be stipulated that Exhibit No. 26, Plaintiff's Exhibit, is a certified copy of the death record of Arthur Victor Heavingham, the deceased involved in this lawsuit?

Mr. Martin: So stipulated.

Mr. Hepperle: And that it may be received in evidence as such exhibit, subject to His Honor's approval, Exhibit No. 26?

Mr. Martin: If Your Honor please, there is a matter I wish to take up with the Court in this connection, I would like to take it up in the absence of the Jury.

The Court: Well, you mean about this document here?

Mr. Martin: That is correct, Your Honor.

The Court: Well, now, we are confronted with the same problem again. This is admitted in the pleadings, that Mr. Heavingham is dead.

Mr. Martin: That is right, Your Honor. That is the basis of my objection, that it is admitted in the pleadings and that this has no probative value. I don't think it has any probative value. That is the only reason I have mentioned that.

Mr. Hepperle: Yes. I am not offering it solely for the purpose, however, of proof of death. I am offering it under the Code Section which makes it admissible in evidence. [115]

The Court: Well, if we are going to get into a discussion about the matter, I want to do that in the absence of the Jury.

Mr. Hepperle: Perhaps, Your Honor, I might save some time by handing you this. May I now hand up the Code Section?

The Court: I am familiar with the Code Section.

Mr. Hepperle: And that is prima facie evidence in all courts and places of the facts stated in it.

The Court: Well, under the circumstances, then I suppose we had better discuss this matter.

Ladies and Gentlemen of the Jury, under the circumstances, Your Honor, then I suppose we had better discuss this matter.

Ladies and Gentlemen of the Jury, I will excuse you at this time. You may be on your lunch hour at this time, but we are going to return at 1:30, half-past one today, to proceed with the trial of this case. So you remember the admonition of the Court and you may leave at this time.

(Whereupon the Jury retired from the court room, and the following proceedings were had outside the presence of the Jury.)

Mr. Hepperle: Our position is, Your Honor—may I proceed?

The Court: Yes, you may. The record may show

that the jurors are outside of the court room beyond the hearing of these proceedings. [116]

Mr. Hepperle (Continuing): —is that this record is absolutely admissible under this Statute and under the decisions and we are offering it not only for the purpose of showing the death, but under the particular phrasing of the Statute, reading as follows:

“Any photostatic copy of the record of a birth, death or marriage, or a copy, properly certified by the State or local registrar or County Recorder to have been registered within a period of one year from the date of the event, is prima facie evidence in all courts and places of the facts stated in it.”

Your Honor, of course, in the many years of practice, I have again and again come across the same point in relation to cause of death under insurance policy, cause of death in an accident.

The Court: Well, Mr. Hepperle—

Mr. Hepperle: Yes, Your Honor?

The Court: Perhaps I can focus the problem that is confronting me here. I assume that what you want to do is get into evidence this statement here:

“That the deceased came to his death from scalding burns over the entire body,” and so forth?

Mr. Hepperle: Yes, Your Honor. [117]

The Court: Well, may I point out to you that this document shows on its face that the deceased died instantly. It can't be otherwise because it says here the time of the injury, 2-24-54, 2:30 a.m. Date of death, February 24th, 1954, 2:30 a.m.

Mr. Hepperle: My position in the case, Your Honor, was this: That all the facts, whatever they may be, should go in, and I want that in. And I appreciate, Your Honor, very much calling my attention to this, but may I briefly state our entire picture as we saw it? It was this——

The Court: Well, Mr. Hepperle, is it understood you are going to put this in evidence, you are going to be bound by this, and you can't have your cake and eat it too.

In other words, if one part goes in, it all goes in. And in the face of that record, you would want it to go in evidence, why, I think you are entitled to have it go in. But I didn't want to have another argument come up a little later on that you are only bound a little bit by this evidence here.

Mr. Hepperle: Well, in view of Your Honor's statement and in view of the particular type of case this is, and the care that has been given it by Your Honor and, I think, counsel and myself, I will be guided by Your Honor's views and——

The Court: I just wanted to make the position clear, [118] Mr. Hepperle: I am projecting the thing out now because I know that it's going to happen, at least I think I do—maybe I am anticipating something that will never happen, but I suspect that the defense is immediately going to take this document and says this proves conclusively to the Jury here that there is no period of suffering involved in this case here. When that is established, then the only purpose that this could

have, scalding burns over the entire body, would be for the purpose of inflaming the Jury.

Mr. Martin: That is correct, Your Honor.

The Court: And I am awfully afraid of the thing; I am awfully afraid of it.

Mr. Hepperle: Well, then, I will be guided by Your Honor's views.

The Court: Have you any other—Now, I am not going to tell you gentlemen how to run your law-suits.

Mr. Hepperle: I know that.

The Court: I am here just as the umpire and if there is an objection before me—and perhaps I should keep my mouth shut, but I frequently think out loud in these matters here and I am anticipating something because we are running out of time, so to speak.

But now, do you have anything else you want to—Yes, Mr. Martin?

Mr. Martin: Your Honor, I wish to enter an objection for [119] the record. I realize that that Statute that counsel has stated, but I will make my objection upon the ground that the information contained here as to cause of death is hearsay and, secondly, there is no foundation laid because the fact that the cause of death that is given there is scalding burns over the entire body does not tend to establish that there is any conscious pain and suffering in this case because there is no evidence in the record at all as to any survival beyond the time of impact.

The Court: I don't think there is any merit to

your objection that this isn't admissible because that has been gone into pretty thoroughly, that it is admissible. As to the prima facie proof of anything, it is not just prima facie proof of a little bit, but of the whole thing. That is what I am pointing out, that is the danger of this thing. So I leave the matter with you gentlemen. It has been offered into evidence. You have raised an objection on the matter, Mr. Martin, and it's my opinion at this time that it's admissible in evidence. But I say that solely because it's a question of fact for this Jury to determine here and not for me to determine at this stage of the proceeding and I think the thing is full of all sorts of trouble.

Mr. Hepperle: Suppose we do this with Your Honor's approval. We are almost at twelve, about a minute, a couple of minutes left. Let us study it over the noon hour. We [120] have understood Your Honor's views, and I think we can move quickly.

The Court: Let's do this: If it is your intention to offer this in evidence, I will admit it in evidence at this time, but if you want to withdraw the offer and renew it later on, that is your way of handling it. But I want to bring this to a head now so we don't have anything hanging over during the lunch hour.

Mr. Hepperle: Thank you, Your Honor. We withdraw the offer at this time of Plaintiff's Exhibit No. 26.

The Court: Well, it may be marked for Identification only at this time.

Mr. Hepperle: Yes, Your Honor.

The Court: And then it will stand that way unless it's re-offered at a later date. I will say, Mr. Martin, unless you can convince me otherwise—it won't be the first time that I have been shown that I was wrong about something, why, it's my opinion that this document is admissible in evidence, but it's not a little bit admissible, it's admissible all the way.

Mr. Martin: Well, I don't know if I made myself clear, Your Honor. My only thought is, as far as—I realize that there is a conflict in the document—but my position again, to make it clear to Your Honor, is——

The Court: Well, isn't it your position, Mr. Martin, that [121] it has no probative value, is that correct?

Mr. Martin: Yes.

The Court: All right. That is a question of fact. I do not think—I have told you gentlemen earlier, and I repeat again—that I am very scrupulous, maybe too scrupulous, about taking matters away from the Jury. Once the case is to be tried by a jury, I say try it with the jury, not put me in a position where I have got to decide all the tough ones and let them have the easiest ones to decide.

Mr. Martin: Very well, Your Honor. Only one other matter; Mr. Hepperle and I were discussing this out in the hall a few moments ago.

As I understand it, Mr. Hepperle, you are near the conclusion of your case?

Mr. Hepperle: Yes.

Mr. Martin: And I expect my case will be very brief, Your Honor, no more than half an hour.

Now, under the circumstances we will probably run out of testimony about two'clock. What is Your Honor's wish as to how to proceed from there?

The Court: Well, I have already indicated to you my wishes in the matter. In addition to that I have picked up one of your San Francisco colds, which doesn't add anything to my desires to remain in your City here. But if my wish is to be given any consideration—and I am sure you [122] gentlemen will, insofar as you feel it can without depriving your clients of any rights, I would like you to argue the case and get it out of the way so I can instruct the first thing in the morning. Now if that can be done—but if this thing is to go over, run over to a place where's it's going to mean an extremely late session or any other course of events that would make it impractical, then I would let you argue tomorrow morning and instruct immediately after lunch.

Mr. Hepperle: Thank you, Your Honor. I would like to give that consideration during the noon hour and I will see whether there isn't a way for us to shorten it so that we could,—because all of us, I am sure, this particular circumstance, even, on our own would like to finish it if it can be done.

The Court: Well, I propose to see the case finished regardless of what the situation is. And, as I say, if we have to run a long session or even a night session today in order to accomplish that, I

shall do it, but on the other hand, I am very reluctant to do anything that would make it difficult or impossible for either side to receive a full and complete and fair hearing in this matter. So I simply tell you what the situation is and act accordingly on the matter.

While we are talking about matters here, I am not now expressing any final views, I am simply telling you what has occurred in my mind up to the present time, and perhaps you [123] ought to give this some thought during the lunch hour. I think so far as the plaintiff is concerned, that there is no substantial evidence here that this case up to the present time would warrant any award for pain and suffering of the deceased. Now that is just my view of the evidence. I am still going to let it go to the jury regardless of what my views are on it. I am telling you this so you know what is going on in my mind. I will say also that I think that the evidence is completely devoid of any substantial showing that the deceased was guilty of contributory negligence in this case.

In other words, I think each of you have made a point or are making a point that you are just pursuing a will-o'-the-wisp, and I want to repeat again two things:

Number One, it's your case to try, and I am not going to tell you what to do or how to do it.

Number Two, I am going to say that when you

go ahead and proceed with your case I am going to give this jury a full opportunity to decide it. But I think you ought to seriously consider those two problems during the lunch hour and see if you don't want to do something about it.

Now, I am not going to interject myself in the case. I promise you now that I will not make any comment on the evidence to the Jury. I don't believe in it and I am not going to do it. So you are perfectly safe from me giving an [124] instruction, when I instruct this Jury, that I think the claims of the plaintiff are unjustified on this one item, or that I think the claim of the defendant, that there is contributory negligence or something, is unjustified. I am not going to do it. But I tell you that that is what is going on in my mind. I think if the Jury should find otherwise on either one of those, I should be obliged to upset your verdict in this regard.

Now, this exception to that: I haven't heard all the evidence, I may change my mind completely when I have heard the balance of the evidence. But at this stage of the case, why, that is my feelings.

I tell you that. I hope you will understand my position so that I am not forcing anything upon you. I am not advocating anything to you. I just want to be fair with you as I am sure you are being fair with me, and telling you what is going on in my mind here. It is pretty difficult to know what

is going on in the mind of a Judge. It is pretty difficult to know what he thinks. But nevertheless, I want to be fair and tell you what is going on in my mind. Very well, 1:30.

(Whereupon an adjournment was taken in this cause until the hour of 1:30 o'clock p.m., this date.) [125]

Afternoon Session, Thursday, Feb. 3, 1955,
1:30 O'clock p.m.

The Court: The Jury are all present, you may proceed, gentlemen.

Mr. Hepperle: I now formally offer in evidence, Your Honor, Plaintiff's Exhibit No. 26, being the certified copy of death record.

Mr. Martin: Object to it on the grounds previously stated.

The Court: Objection will be overruled, be admitted in evidence.

(Thereupon death record referred to above, formerly marked Plaintiff's Exhibit No. 26 for Identification, was received into Evidence.)

33398

P116s No. 26
FEB 1955

CERTIFIED COPY OF DEATH RECORD

REGISTRATION DISTRICT No 5700 REGISTRAR'S NUMBER 66

DECEDENT. PERSONAL DATA (TYPE OR PRINT NAME)	1a NAME OF DECEASED—FIRST NAME ARTHUR		1b MIDDLE NAME VICTOR		1c LAST NAME HEAVINGHAM		2a DATE OF DEATH—MONTH DAY YEAR Feb. 24, 1954		2b HOUR 2:30 A.M.		
	3 SEX male		4 COLOR OR RACE white		5 MARRIAGE STATUS married		6 DATE OF BIRTH June 4, 1897		7 AGE (LAST BIRTHDAY) 56 YEARS		
	8a USUAL OCCUPATION (JOB OR MONEY OF WORKING LIFE ETC.) Brakeman			8b KIND OF BUSINESS OR INDUSTRY S.P. Co.			9 BIRTHPLACE (STATE OR FOREIGN COUNTRY) Canada		10 CITIZEN OF WHAT COUNTRY? USA		
PLACE OF DEATH	11 NAME AND BIRTHPLACE OF FATHER Frederick Heavingham				12 MAIDEN NAME AND BIRTHPLACE OF MOTHER Alice Glover England				13 NAME OF SPOUSE (IF MARRIED) Mary V. Heavingham		
	14 WAS DECEASED EVER IN U.S. ARMED FORCES? yes				15 SOCIAL SECURITY NUMBER 565-07-0760		16 INFORMANT Chester A. Heavingham				
	17a PLACE OF DEATH—CITY OR TOWN (IF IN HOSPITAL OR INSTITUTION, GIVE STREET ADDRESS OR LOCATION) Yolo Co. (near Davis) not in a hospital						17b LENGTH OF STAY (IN THIS PLACE) passing		17c COUNTY Yolo		
CAUSE OF DEATH (ENTER ONLY ONE CAUSE PER LINE FOR 1A, 1B, AND 1C-1)	18a STREET ADDRESS (IF RURAL, GIVE LOCATION) 617 Warner St., San Lorenzo		18b CITY OR TOWN (IF OUTSIDE CORPORATE LIMITS, STATE RURAL AND NAME OF COUNTY) Alameda		18c COUNTY Alameda		18d STATE Calif.				
	19 I DISEASE OR CONDITION DIRECTLY LEADING TO DEATH Scaldin, burns over entire body										APPROXIMATE
	19 II OTHER SIGNIFICANT CONDITIONS CONDITIONS CONTRIBUTING TO THE DEATH BUT NOT RELATED TO THE DISEASE OR CONDITION CAUSING DEATH										INTERVAL BETWEEN ONSET AND DEATH
OPERATIONS	20a DATE OF OPERATION		20b MAJOR FINDINGS OF OPERATION							21 AUTOPSY <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
	22a ACCIDENT (SPECIFY) SUICIDE HOMICIDE accident		22b PLACE OF INJURY (R.F.S., FACTORY STREET OFFICE BUILDING, ETC.) S.P. Railroad		22c LOCATION CITY OR TOWN COUNTY 1 mi east Davis Yolo Calif.						
PHYSICIAN'S OR CORONER'S CERTIFICATION	22d TIME OF INJURY 2-24-54 2:30 A.M.		22e INJURY OCCURRED <input checked="" type="checkbox"/> WHILE AT WORK <input type="checkbox"/> NOT WHILE AT WORK		22f HOW DID INJURY OCCUR? as stated above						
	23 SIGNATURE W. C. McNary Coroner of Yolo Co.				23a ADDRESS Woodland, California				23b DATE SIGNED 2-25-54		
FUNERAL DIRECTOR AND REGISTRAR	24a BURIAL (RESERVATION) 3/1/54		24c CEMETERY OR CREMATORY Mt. View, Oakland		25 SIGNATURE OF EMBALMER M.N. Sculver		25b LICENSE NUMBER 2844				
	27 DATE RECEIVED BY LOCAL REGISTRAR 2/25/54		28 SIGNATURE OF LOCAL REGISTRAR Herbert Bauer, M.D./BF		26 FUNERAL DIRECTOR GRANT D. MILLER						

DATES OF AMENDMENTS IF ANY

CERTIFICATION STATEMENT This is to certify, that the foregoing is a true and correct copy of statements appearing on the record of death of the above named decedent as filed in this office.

SIGNATURE OF CERTIFYING OFFICIAL
Herbert Bauer, M.D. & Mungson Deputy
PLACE OF CERTIFICATION
Yolo County Health Department

OFFICIAL TITLE
Health Officer
DATE OF CERTIFICATION
5/11/54

Mr. Hepperle: I likewise formally re-offer Plaintiff's Exhibits 1 to 12, inclusive, being the photographs heretofore identified and marked, and the other group of photographs, Thirteen to Twenty, respectively, and each of the photographs in those two named exhibits separately and by themselves.

Mr. Martin: Objection upon the grounds previously stated, Your Honor.

The Court: Let me see the large photographs.

(Court looking at Exhibits 1 to 12.)

The Court: Let me see the small ones again, please. [126]

(Court looking at Exhibits 13 through 20.)

The Court: For purposes of illustration and for no other purpose I will permit the photographs heretofore marked Plaintiff's Exhibit 13 for Identification and Plaintiff's 16 for Identification to be received in Evidence. The objection is sustained to the others on the ground that they serve no useful purpose in this case would have no probative value.

(Thereupon Plaintiff's Exhibits Nos. 13 and 16, previously marked for Identification only, were received in Evidence.)

Mr. Hepperle: May I briefly recall the fireman to identify some of these items, and after I have done that, Your Honor, I might state the plaintiff will rest.

The Court: Very well, you may do so.

Mr. Hepperle: Mr. Maasen, will you come forward, please?

GEORGE E. MAASEN

was recalled as a witness on behalf of the Plaintiff, and being previously sworn, resumed the stand and testified further as follows:

Further Redirect Examination

Mr. Martin: Counsel, may I see the pictures first?

Mr. Hepperle: Oh, surely, surely.

I wonder, Your Honor, if I might have your permission [127] to stick them on the blackboard and then he could use the pointer and describe them better than otherwise.

The Court: Very well.

(Putting photographs on blackboard.)

Mr. Hepperle: May we have the board brought forward a little closer, Your Honor, and I will have the witness, with Your Honor's permission, step down here, and I think he can cover it very quickly.

The Court: I want all the jurors to be able to see, and I want to be able to see, too.

Mr. Hepperle: How would it be if temporarily we brought it out here (indicating)?

The Court: If he can step down right there and stand on this side towards this way, then I can still see and not be in front of the jurors.

Mr. Hepperle: Very good.

The Court: Will you step down here on this side. That is fine.

Mr. Hepperle: Q. Now, would you take this pointer, and I will stand back not to obstruct the

(Testimony of George E. Maasen.)

view, and take the first picture to the left on the board, Plaintiff's Exhibit No. 13, and point out what railroad equipment is shown in that picture, with your pointer?

A. Part of the locomotive.

Q. Stand back just a little, if you can. Was that *the* [128] involved in this accident?

A. That's the picture of it.

Q. And the number of the locomotive was what?

A. 4231.

Q. You have talked about the front end of this as being a mallet engine and locomotive. Will you point that out? I think perhaps we will do it better if you will describe to us what is there; I will ask you to do it and you tell it. The front end you have talked about is shown there as caved in. Which was the fireman's side, which was the engineer's side?

A. This was the engineer's side; the opposite side was the fireman's side.

Q. And the fireman's side was your side?

A. That's right.

Q. Now, you have spoken about the engineer and fireman by their respective positions on their seat boxes, each one's window open and looking ahead. Can you point out on this side the approximate location of that seat box and the window referred to?

A. That is the window. The seat box is on the inside just below the window.

Q. Now, does that photograph depict what you

(Testimony of George E. Maasen.)

described in your testimony, or called, a monkey deck? A. No. [129]

Q. Can you give us some idea from that picture as to where and how you got around, as you testified in your testimony?

A. No, there is only part of the engine there, the monkey deck is not there, of course, it is down in this vicinity.

Q. Is the tender shown? A. No, sir.

Q. On this? A. No, sir.

Q. It is clear that on the part off to the left would be the rear end of this locomotive and the attached water tank or tender?

A. That's right.

Q. Now, turn to this photograph No. 16. Do any of the parts there show which you used in getting around? A. No.

Q. What is shown there? You tell it to the Court and Jury and for the record.

A. The cab of the engine and the caboose and boxcar.

Q. Right in front of the man standing to the left in the foreground is an iron structure. Is that what you referred to as the ladder?

A. That's the ladder.

Q. And normally does each side have such a ladder? A. Yes, sir.

Q. State whether or not the ladder on your, the fireman's [130] side, the other side, remained on or not?

(Testimony of George E. Maasen.)

A. This—in this particular picture this is the fireman's side.

Q. This one is? A. Yes.

Q. And state whether or not that ladder is broken loose? A. Yes, it is.

Q. Did you use it in negotiating your way coming and going in the various activities you mentioned?

A. I started down it one time and, of course, the the ladder wasn't in position and I fell down.

Q. Can you tell us somewhat of how you got around from one side to the other of this engine, whether it was always, or in each instance, by use of the monkey deck or whether you ever got around in front of it?

A. No, it was always by the monkey deck. I couldn't get around in front of it.

Q. What is the object in between the car marked "automobile, Southern Pacific" and the front of that locomotive in that picture, Plaintiff's Exhibit No. 13? A. The caboose.

Mr. Hepperle: I think that will suffice.

Further Recross Examination

Mr. Martin: Q. Mr. Maasen, while you are there looking [131] at Plaintiff's Exhibit 13, the photograph on the left, will you indicate in which direction the locomotive was proceeding immediately before the impact occurred, from left to right or right to left?

(Testimony of George E. Maasen.)

A. It was proceeding east, which would be in that direction. (Indicating).

Q. From left to right?

A. From left to right.

Q. Yes. So therefore I take it the cab of the locomotive was actually at the front end of the locomotive, is that right, in the direction of travel?

A. Yes, sir.

Mr. Martin: That is all I have on the pictures, Your Honor, but there is one question I omitted to ask and I would like permission of the Court to ask it of Mr. Maasen.

Mr. Hepperle: We have no objection.

The Court: Proceed.

Mr. Martin: Q. Just be seated, please, Mr. Maasen. Mr. Maasen, how long did you say you had been employed by the Southern Pacific Company?

A. About thirteen years.

Q. I see. And from your experience—let me withdraw that, I don't think you are qualified to answer this question.

Mr. Martin: That is all I have, Your Honor. Thank you.

Mr. Hepperle: That is all, Mr. Maasen. [132]

If Your Honor please, the plaintiff rests.

Mr. Martin: Call Mr. Alsing.

HENRY E. ALSING

was called as a witness on behalf of the Defendant, after being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your full name to the Court and Jury.

The Witness: Henry E. Alsing.

Direct Examination

Mr. Martin: Q. Mr. Alsing, by whom are you employed? A. Southern Pacific Company.

Q. And for how long have you been employed by that company?

A. A little over forty-three years.

Q. And what is the—what capacity do you have with the Company, sir?

A. Secretary, Board of Pensions.

Q. And how long have you been in that department of the railroad?

A. Thirty years next month.

Q. And as such, Mr. Alsing, do you have knowledge of the matters of voluntary retirement of Southern Pacific Company employees?

A. I do. [133]

Q. That includes train men?

A. Yes, sir.

Q. And for the purposes of the record, are conductors and brakemen classified as train men?

A. Correct.

Q. And, Mr. Alsing, let me ask you this: have you figures, Mr. Alsing, upon the matter of the total

(Testimony of Henry E. Alsing.)

number of brakemen—withdraw that—of trainmen employed by the Southern Pacific Company as of December last? A. Yes, sir.

Q. And will you give us that figure?

Mr. Hepperle: Just a moment. That is objected to as wholly immaterial, not an issue here, the injection of extraneous and collateral matter.

Mr. Martin: It won't be extraneous or collateral, Your Honor.

The Court: Objection overruled.

Mr. Martin: Q. Will you please state that figure?

A. As of the middle of December we had 4,090 train men on the system.

Q. And of that number how many were over the age seventy, Mr. Alsing?

A. As of today there are eighteen.

Q. And, Mr. Alsing, with reference to the requirements of [134] the railroad, are there any special restrictions placed upon train men who work or attempt to work after age seventy?

A. Yes, sir, there is.

Q. And what are they, please?

A. They are required to undergo special physical examinations, and also they must have the recommendation of the superintendent as to whether they are properly performing their duties, and whether they are—that is, working around trains, they would have to be alert and able to get up and down on the trains.

(Testimony of Henry E. Alsing.)

Q. And with what frequency are they given physical examinations after age seventy?

A. After seventy special physical examinations every three months.

Q. And in connection with your many years in the department, Mr. Alsing, can you tell us, based upon your experience, what the average age of voluntary retirement of a train man is?

Mr. Hepperle. Objected to upon the ground, for the reason that it is not binding upon the plaintiff in this case, that it invades the province of the Court and Jury, and an attempt by mere declaration of an interested employee, however qualified, to resolve issues in favor of the defendant and against the plaintiff.

The Court: I don't think that you should make a statement [135] like that in making your objection. I instruct the Jury to disregard the statement Counsel just made. It is a law problem and not any dissertation on the qualifications of this witness here.

I overrule the objection.

Mr. Martin: Q. Do you have the question in mind? A. No, I don't.

Mr. Martin: May I have the Reporter read it back, Your Honor?

(Question read.)

A. I would estimate between sixty-six and sixty-seven.

Mr. Martin: You may cross-examine.

Mr. Hepperle: No cross-examination.

Mr. Martin: That is all. Thank you, Mr. Alsing.
Mr. Hoffman, will you please take the stand?

LOREN M. HOFFMAN

was called as a witness in behalf of the Defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: State your full name to the Court and Jury.

The Witness: My name is Loren M. Hoffman.

Direct Examination

Mr. Martin: Q. Mr. Hoffman, are you employed by the Southern Pacific Company? [136]

A. I am.

Q. And in what capacity, sir?

A. Assistant head timekeeper.

Q. Is that where the payroll records are kept, sir? A. Yes.

Q. And, Mr. Hoffman, did you examine the records pertaining to earnings of Mr. Arthur V. Heavingham during the year 1953? A. I did.

Q. And can you tell us, Mr. Hoffman, what the gross income was during that year?

A. \$5,538.11.

Q. And will you tell us, please, what the net take-home pay was after payroll deductions?

Mr. Hepperle: One moment. May I, Your Honor, for the purpose of the record, make an objection?

The Court: You may.

Mr. Hepperle: This is objected to as not a proper

(Testimony of Loren M. Hoffman.)

method of proving earnings, or the lack of them. It injects a wholly collateral matter; it is incompetent, irrelevant, and immaterial for any purpose in the case.

The Court: The objection will be overruled.

Mr. Martin: Q. What was the net take-home pay, Mr. Hoffman? A. \$4,493.13. [137]

The Court: May I have that again, Mr. Hoffman?

The Witness: \$4,493.13.

Mr. Martin: You may cross-examine.

Mr. Hepperle: No cross-examination.

Mr. Martin: Thank you, Mr. Hoffman; that is all.

The defense rests, Your Honor.

Mr. Hepperle: The plaintiff rests, Your Honor.

The Court: Have you discussed the problem that we talked about before the adjournment, or before you left at noontime? What are your wishes now?

Mr. Hepperle: I didn't hear that last.

The Court: I say have you discussed the problem of arguments, to be specific?

Mr. Hepperle: Yes, my view is this, Your Honor: if it is all right with the Court and Counsel, I would just as soon argue this afternoon and begin as soon as it is convenient.

Mr. Martin: The only question in my mind is this, Your Honor: I would not like to, if we argue this afternoon, I wish all argument to be completed.

The Court: It will have to be completed this afternoon. I am not going to split any arguments.

Mr. Hepperle: I should like an hour, if I may have it, Your Honor.

The Court: All right, be an hour each side then, that [138] will be the limit, to one hour's argument, and I will give you a five-minute warning and a one-minute warning, and when I tell you that your time is up, I don't expect you to stop in the middle of a sentence, but I do expect your argument to stop as soon as you bring that point to a close.

You want to take a brief recess before we start the argument?

Mr. Hepperle: I think it would be a good idea.

The Court: Perhaps give you an opportunity to go over your notes.

We will take a brief recess at this time and then we will hear the arguments.

Ladies and gentlemen of the Jury, you will remember the admonition of the Court heretofore given.

(Recess.)

* * * * * [139]

Friday, February 4, 1955

The Court: The record may show the jurors are all present.

Ladies and Gentlemen of the Jury, it now becomes the duty of the Court to instruct as to the law governing your deliberations in this case. Upon all questions of law, it is your duty to be guided by the instructions of the Court and to accept the law as given to you by the Court. You are, however, the sole and exclusive judges of all questions of fact and the weight and effect of the evidence and of the

credibility of the witnesses. Your power of judging the effect of the evidence is not arbitrary, but is to be exercised with legal discretion and in accordance with the rules of evidence.

You must not consider for any purpose any testimony which has, by order of the Court, been stricken out. Such testimony is to be treated as though you had never heard it.

You should disregard statements, if any, made by the attorneys not supported by the evidence. However, any facts stipulated to by counsel may be treated by you as facts proven in the case.

Sometimes, when the use of a pronoun is appropriate in an instruction, the masculine form only is used as a convenience in composition, although the instruction may refer and apply to the plaintiff or the defendant or a witness or [165] other persons who, in the case on trial, is a female person or a corporation. Whenever the masculine pronoun is so used, its reference embraces the female person or such a corporation, respectively, to the same effect as if the corresponding female or neuter pronoun were substituted.

The defendant in this case is a corporation, but that fact should in no way prejudice you in your deliberations or in your verdict. This case must be considered by the Jury the same as if it were an action between persons of equal standing in the community. The fact that one of the parties is a corporation should not affect or prejudice your minds in any way, but the rights of the parties should and must be determined upon the evidence

introduced in the case and the instructions given to the Jury by me.

These instructions which are given to you are the law and the only law to guide you in your deliberations.

In civil cases—and this is a civil case—the affirmative of issues must be proved by a preponderance of the evidence. The affirmative here is upon the plaintiff as to all of the affirmative allegations in his complaint which have not been admitted by the defendant, and upon the defendant as to any of the affirmative allegations of his answer. The burden of proof, therefore, rests upon the party making such affirmative allegations which are not admitted by the opposing party. If the evidence is contradictory, your decision must be [166] in accordance with the preponderance of the evidence. It is your duty, if possible, to reconcile such contradictions so as to make the evidence unveil the truth. When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof.

By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it, has more convincing force and upon which it results of the greater probability is in favor of the party upon which the burden rests. Preponderance of evidence does not mean the greater number of witnesses, but the greater weight, probability, quality and convincing effect of the evidence and

proof offered by the party holding the affirmative as compared with the opposing evidence.

The Jury is the sole and exclusive judges of the effect and value of evidence addressed to it, and of the credibility of the witnesses who have testified in the case. There are some standards or rules by which you can measure the testimony of a witness and evaluate it and determine whether or not you want to believe it or how much of it you want to believe. The character of the witness, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and determining whether or not they have spoken [167] the truth. The Jury may scrutinize the manner of the witness while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, his interest in the case, if any, his bias or prejudice, if any, by the character of his testimony, or by contradictory evidence.

A witness may be impeached by contradictory evidence or by evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony as to any material matters to the cause on trial.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect,

if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The Jury may reject the whole of the testimony of a witness who has wilfully sworn falsely to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully with a design to deceive, then you may treat all of his testimony [168] with distrust and suspicion and reject all unless you shall be convinced that he has in other parts sworn to the truth.

You may also consider the manner in which a witness may be affected by the results of your verdict. You may also consider the extent to which he has been corroborated or contradicted by other evidence. Of course, any matter, in general, which you contend reasonably sheds light upon the credibility of the witness may be considered by you.

The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in a case of the character of the one that you are now hearing. You are not bound to decide it in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number, or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean you are at liberty to disregard the testimony of the greater number of witnesses

merely from caprice or prejudice or from a desire to favor one side as against the other.

It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The testimony of each and every witness who has taken the witness stand in this [169] case must be considered fairly and weighed and judged by the same rules and tests to determine its weight and the credibility of the witness.

The plaintiff in this case is the personal representative of Arthur V. Heavingham, deceased, the plaintiff being the special administratrix of the estate of the deceased person. The plaintiff brings this action for the benefit of herself as the surviving widow of the deceased, and Kathleen Heavingham, the minor daughter of the deceased. These persons for whose benefit plaintiff acts are the real parties in interest and in that sense are the real plaintiffs. When later referred to in these instructions, I will refer to them as the beneficiaries of the action.

It is compensation for the pecuniary loss suffered by them which plaintiff is entitled to recover by this action.

The term negligence is used in the statute on which this action is predicated, and it will be used throughout these instructions, so it is essential that

you be given a definition of the term which I hope you will have no difficulty in understanding.

Negligence is the omission to do something which an ordinarily reasonably prudent person would have done under the same or similar circumstances, or is the doing of something which an ordinarily reasonably prudent person would not have done under the same or similar circumstances. It is not [170] absolute or intrinsic, but must always be determined by reference to the facts and circumstances existing at the time and not by reference to after-acquired knowledge.

Negligence can be an act of omission or an act of commission, and the standard is what the ordinarily reasonably prudent person would have done under the same or similar circumstances. Negligence may be active or passive in character, and in order to establish negligence, it is not incumbent upon the party who has the burden of proving the negligence to prove that the person to be charged with negligence intended to commit the injury of which complaint is made.

By her complaint in this case, the plaintiff seeks to recover damages sustained as the result of the death of the *Arthur V. Heavingham*. Many of the allegations in plaintiff's complaint are admitted by the defendant in its answer, or have been stipulated to be true during the course of the trial.

And insofar as these admitted or stipulated facts are concerned, you should treat them as being the established facts of this case.

By this agreement of the parties, these matters

have been agreed upon by them, to wit: The time and place of the accident, the fact that the deceased was at the time of his death employed as a head brakeman by the defendant, that the train was operated at the time of the accident in a careless [171] and negligent manner; that the deceased was killed in said accident, that the plaintiff has the legal capacity to bring this action, that Mary V. Heavingham is the surviving widow of the deceased and that Kathleen Heavingham is the minor surviving child of the deceased.

Actually, the issues for you to determine in this case are two-fold. First, you must determine whether the deceased was contributorily negligent. I will give you the law applicable to contributory negligence later in these instructions. Finally, as to the ultimate issue for your determination in this case, you must determine in dollars and cents the amount of damages that should be awarded to the plaintiff. Later in my instructions I will tell you how these damages should be calculated by you.

As I have told you, the defendant has conceded the existence of certain facts in this case. The mere conceding of these facts in itself should in no way prejudice you either for or against either of the parties, nor influence you in any way in determining the issues which you are called upon to resolve in this case.

In the action that we are now trying, plaintiff seeks to prove and enforce a liability under the law of the United States Government commonly known as the Federal Employers Liability Act. This title

by which the act is generally known must not suggest to you that the law places an absolute [172] liability upon the defendant to respond in damages for every injury sustained by an employee while engaged upon the duties of his employment. Such an implication would be false. The title so used is merely a means of identification and you will look not to it but to the instructions of the court for the principles of law that must guide your deliberations.

The Federal law which concerns us in this trial provides that a common carrier by railroad, such as the defendant here, shall be liable in damages for the death of any employee who dies from injuries received while he was engaged in the duties of his employment if the injuries were the proximate cause of his death and such injuries resulted in whole or in part from the negligence of any of the officers or agents of the carrier or of any employee of such carrier, and not solely from the negligence of the one so injured. If all of the factors mentioned as creating such liability existed, the fact, if it was the fact, that the employee who thus came to his death was himself guilty of contributory negligence, shall not be a total bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The application of this rule will be explained to you later in my instructions.

As I have already told you, the defendant in this case has admitted that it was through its employees' negligence [173] that the accident in question oc-

curred and that such negligence was a proximate cause of the injuries which resulted in the death of the deceased. These admissions make the defendant liable in damages subject only to the reduction of the employee's contributory negligence, if any, and about which I will tell you later, although the carrier's negligence was not the sole proximate cause of the injury, and although the negligence of a third person, neither the employee nor the carrier, may have contributed in equal, greater or lesser degree in causing the injury.

I charge those members of the jury who have had previous experience as trial jurors in negligence cases arising under State laws to dispel from their minds any and all conceptions that they may have with respect to the law of negligence as gained from the instructions of the Court in those cases because in some respects the State and National laws conflict and in actions under the Federal Employers Liability Act, which proceed under National rather than State authority, you are bound to follow the instructions as now given to you by the Court which proceed under a National as distinguished from a State authority.

Some States, of which California is one, have statutes dealing with compensation to employees for injuries suffered in the course of and arising out of the course of their employment and which are insurance statutes, and where they [174] apply, provide for compensation for injury to an employee even though there is no fault or negligence on the part of the employer. I am referring to the Work-

men's Compensation provisions of the Labor Code of the State of California, and I point out that the statute is an insurance law and insofar as we are concerned here, negligence is of no importance in that statute. No State statute of that kind has any application to this case.

As I have already suggested to you, the effect of contributory negligence on the plaintiff's claim is different in a case brought under the Federal law here involved from what it is in the usual action for damages based on alleged negligence and brought under State laws. In the latter type of case wherein the State laws are controlling, contributory negligence by a person usually is a bar to any recovery by him. But in an action such as we are now trying here under the Federal law applicable, contributory negligence, if any existed, does not entirely bar recovery, but does require proportional reduction in the damages that otherwise would be recoverable.

I shall explain the application of this rule. A person is guilty of contributory negligence if he himself is negligent and his negligence concurring in any degree with the negligence of another or of others aids and proximately causing injury to himself. [175]

In considering the issue of contributory negligence the fundamental matter for you to consider is whether the deceased was guilty of any negligence which contributed in any degree as a proximate cause of the deceased's death. If you should find that the deceased was guilty of no such con-

tributory negligence, then under the admissions of the defendant in this case you must fix the amount of plaintiff's damages and return a verdict in her favor. If, however, you should find that the deceased was guilty of contributory negligence, as I have defined that term to you, you must follow the law and procedure for arriving at damages and diminishing the same in proportion to the amount of negligence attributable to the plaintiff in accordance with the instructions that I shall give on such matters.

For the purpose only of illustrating how to apply the law that requires a proportional reduction in damages in the event of a finding that both defendant and deceased employee were guilty of negligence which contributed as a proximate cause of the deceased's injury and death, let us assume that a jury in a case similar to this one has made such findings. Its first step would be to determine the amount of damages to which the plaintiff would be entitled under the Court's instructions if the factor of contributory negligence were not present and the other necessary elements of liability were present. Let us call the amount X dollars. The jury next [176] would be required to view as a combined effect the negligence of the defendant and the negligence of the deceased which were proximate causes of the injury. Then with that combined negligence in mind the jury would determine what portion of it in fraction or percentage consisted of the deceased employees' own conduct. If, in the jury's judgment, one half of such combined negli-

gence was the deceased employee's then it would award Plaintiff but one half of X dollars. If two thirds of such negligence was the deceased employee's, then the jury would award only one third of X dollars. If one third of such negligence was the deceased employee's, then the jury would award plaintiff two thirds of X dollars.

You will bear in mind that in giving you this illustration to be considered only in the event that you findings should make it appropriate, I do not mean to convey any suggestion whatsoever as to what your verdict should be in this case.

In this case if you should determine that the deceased was not guilty of contributory negligence, you will award plaintiff such sum as under all the circumstances of this case will be just compensation for the pecuniary loss suffered by the beneficiaries of the action, the names of whom I have previously given you, which loss has resulted and is reasonably certain to result from the death of the deceased. I will advise you how to measure this loss in just a few moments.

If you should determine that the deceased was guilty of contributory negligence, then before you diminish the damages [177] in proportion to the negligence attributable to him, as I have instructed you, you will arrive at the amount of damages to which plaintiff would have been entitled had it not been for such contributory negligence.

In determining the pecuniary loss to which I have referred, you may consider the age of the deceased

and of Mary V. Heavingham and Kathleen Heavingham, the beneficiaries of this action, the state of health of the deceased, and of each beneficiary as it existed at the time of the death and immediately prior thereto, their station in life, their respective expectancies of life, as shown by the evidence, the disposition of the deceased to contribute financially to the support and other advantages of the beneficiaries and his actual habits and practices in respect to the making or in making of such contributions, the ability of the deceased and his inclination to, and habit of performance, or in performing services having monetary value for any beneficiary, what the deceased was earning at the time of his death, what he customarily earned prior thereto, and within a time reasonably to be considered, what his earning capacity was, what his personal expenses and other charges and deductions against his earnings were, and such other facts shown by the evidence as throw light upon the question of what pecuniary benefits each beneficiary might reasonably have been expected to receive from the deceased had he lived beyond the date of [178] his death.

With respect to the matter of life expectancy, you will keep in mind that the prospective period of time that will be of concern to you in your effort to find the pecuniary loss of the beneficiary is the life expectancy of the deceased, since all of the evidence shows that the life expectancy of the deceased was less than that of either beneficiary.

The reason for this rule is obvious since one could

not derive financial benefit from the life of another for longer than while both are living.

You are not permitted to award plaintiff any sum as a balm to the feelings of either beneficiary, or for the grief or sorrow of such persons, or for the loss of society or companionship of the deceased, or for the loss of purely sentimental values that were attached to that society.

In respect to the child Kathleen, you will have in mind the duty of a parent to provide nurture and intellectual, moral and physical training for a child such that if it had been obtained from others it would require financial compensation. If the evidence shows fitness and inclination of the deceased parent to contribute these values to his child, or any of them, and that the child has been deprived of them by the death, that the pecuniary value of any such lost benefits would be a proper element of damages in this case.

It should, however, be kept in mind that a child's right [179] to contributions from her parents ceases when she marries or reaches the age of majority. Therefore, you should restrict this element of your award to the minority of Kathleen.

In determining the present value of any future benefits that you should find to have been lost by the death of the deceased, you will calculate on the basis that any sum you might award will be handled and invested with reasonable wisdom and frugality and that all of it, except as currently and reasonably needed, will be kept so invested as to yield the

highest rate of interest consistent with current interest rates and reasonable security.

The present value will be a sum which, when supplemented by such income from it, will equal the total of lost future benefits.

The measure of the pecuniary loss to which I have referred insofar as it relates to the future, and in the case of each beneficiary, is the present monetary value of the future benefits of which the beneficiary has been deprived by the death of the deceased, and which are capable of measurement by a pecuniary standard. To fix the present value of such future benefits requires that you deduct from the total of such benefits a proper allowance for the future earning power of whatever award you now may make in this case.

There is a further issue in respect to damages that you will determine in this case. If you should find that between the time of the injury and the time of the death there was [180] an appreciable period of time in which the deceased, not as a mere incident of death or substantially contemporaneous with it, but while he was conscious and as a proximate result of such injury suffered pain, discomfort, fear, anxiety and other physical, mental and emotional distress, you will arrive at an amount that will be just compensation for such pain and suffering. I shall refer to that sum as general damages.

If you find that the deceased was not guilty of contributory negligence, as I have heretofore defined that term for you, the amount of such general

damages may be included in your award to the plaintiff. If said deceased employee was guilty of contributory negligence, then the amount of such general damages shall be included in the figure representing the total sum of damages from which you are to deduct a portion because of such contributory negligence in regard with the instructions previously given.

The burden rests upon the plaintiff to prove by a preponderance of the evidence all of the elements of the damages claimed in her complaint. The mere fact that the accident happened, considered alone, would not support a verdict for any particular sum.

It is not necessary that any witness should have expressed an opinion as to the amount of damages, if any, that should be allowed for the conscious pain and suffering of the deceased, if any. In this regard the law prescribes no definite measure [181] of damages but leaves such damages to be fixed by you as your sound discretion shall dictate to the end that under all of the circumstances shown by the evidence your award in this regard is fair, just and proper.

According to the American experience table of mortality the life expectancy of a male aged 57 years is 16.05 years. The life expectancy of a female aged 49 years is 21.63 years, and the life expectancy of a female aged 10 years is 48.72 years. According to the United States life tables, the life expectancy of a male aged 57 years is 16.98 years. The life expectancy of a female aged 49 years is

25.54 years, and the life expectancy of a female aged 10 years is 60.85 years. These facts, of which the Court takes judicial notice, are now in evidence to be considered by you in arriving at the amount of damages that you may find that plaintiff is entitled to receive in this case. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining life of all such persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same [182] issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the amount of the prayer of such complaint asking for certain compensation is to be considered by you in arriving at your verdict except in one respect, that the amount of damages alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

In returning your verdict to the plaintiff it shall be a single sum representing the aggregate of the pecuniary loss suffered by the beneficiaries of this

action, whose damages must be found in accordance with my instructions to you.

In other words, you will not, in your verdict, allocate the damages between the beneficiaries of this action. Such allocation will, if necessary, be determined in other appropriate proceedings.

In fixing the amount of your award in this case you must not include any sum or enlarge an otherwise just award for the purpose of punishing defendant or to set an example. To include such a sum would be to award punitive rather than compensatory damages, and the law does not authorize punitive damages in this action. Your award must be compensatory only.

Both parties are equally entitled to your fair consideration and to the protection of your impartial judgment. Further, the law does not permit you to take into consideration the matter of court costs or attorneys' fees or such matters, as such matters are not submitted to you for determination and are of no concern whatsoever in this case.

The law absolutely forbids you to determine any issue in this case by resorting to chance. You will understand this principle of law better, perhaps, if I give you an illustration. The defendant has conceded that the plaintiff is entitled to recover some amount of damages in this case. Let us suppose that the jurors agree that each juror shall write down or state an amount of damages that he believes should be awarded, and all such amounts shall be totalled, the total divided by twelve to find the average, and that the average so found shall be agreed

by the jury in advance to be the amount of the verdict. To use such a method would be to determine the issue of damages by chance, and it would be unlawful and a violation of your oath as jurors.

It is your duty as jurors to consult with one another and determine with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I say that you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors and you should not hesitate to change an opinion when convinced it is erroneous. However, none of [184] you should vote in any manner nor be influenced in so voting for the simple reason that a majority of the jurors are in favor of a particular verdict. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict solely because of the opinion of the other jurors.

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relative to any of these matters, I instruct you to disregard it.

I think I have now given you as briefly as possi-

ble for me to do so under the circumstances the various rules and principles which are to govern you in your deliberations and in your determination of the factual questions which are yours for decision. If you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room and if after you have discussed the case between yourselves you are satisfied that your original view of the case was erroneous, I ask you not to [185] be stubborn and in that situation do not hesitate to change your views. However, if after a full exchange of views with your fellow jurors you still feel you are right, of course you should maintain your position and you should not surrender it merely for the purpose of arriving at a verdict or merely because a majority of the jurors have the opposite leaning.

Upon retiring to the jury room you will select one of your number to act as your foreman or forelady, who will preside over your deliberations and who will sign the verdict to which all of you agree. It will be the duty of the one so selected to serve as your spokesman in any further proceedings in this case, and the person selected to act as foreman or forelady should permit full and free discussion of the case by jurors in the jury room, and the other jurors should assist the foreman or forelady so selected to keeping the proceedings orderly and expediting the proceedings of the jury in the jury room.

If you desire to see any of the exhibits admitted

in evidence you may advise the Court Crier of that fact and the exhibits that you wish to see will be delivered to you in the jury room. If it should become necessary for you to communicate with the Court on any matter connected with the case while you are deliberating, I admonish you that you must not disclose to the Court how you stand numerically or otherwise, and this admonition you are to adhere to until the jury has reached a verdict. It will take all 12 of you to reach a verdict. When [186] all 12 of you have agreed on a verdict, that is the verdict of the jury.

There has been prepared for your convenience a blank form of verdict. This form of verdict has no significance in and of itself and is not to be considered by you for any purpose other than as a convenience for your use.

When you have reached your verdict, it must, as I have already told you, be unanimous. The foreman or forelady should fill in on the blank form the amount of damages agreed upon by you and sign the verdict form. You shall then return the same to the Court.

Has the plaintiff any exceptions or objections to the instructions at this time?

Mr. Hepperle: I have, Your Honor.

The Court: Does the defendant have any?

Mr. Martin: I have one, Your Honor.

The Court: Ladies and gentlemen of the jury, I will excuse you at this time while I discuss this question of law again with Counsel, see if we can

resolve it and at least enable them to protect their record in this case here, so you will be excused at this time. You will remember the admonition of the Court heretofore given.

(Whereupon at 10:39 a.m. the jury retires from the Court Room.)

The Court: The record may show the jury has gone out [187] of the hearing of the Court. Mr. Hepperle.

* * * * *

Mr. Martin: If Your Honor please, I would like to make [188] an exception on behalf of the defendant to the failure—to the giving of the Court's instructions going to the subject of conscious pain and suffering as an element of damage, and to the failure to give defense instruction, proposed instruction No. 9 which, in effect instructs the jury that there is no issue in this case on conscious pain and suffering, upon the grounds that under all the evidence in the case there was no such issue of fact to go to the jury on that question.

And I also will take exception, Your Honor, to the failure to give defense instruction No. 10 which further qualifies the life expectancy instructions in that it points out to the jury that a person will not necessarily work his full life expectancy.

The Court: Those exceptions will be noted in each instance. I may say to you gentlemen, though, that I told you yesterday noon that I considered

these things were, these matters to which you are now excepting, were just going to get us all in trouble in this case, and of course each of you wanted to put the monkey on my back, so I have to say what was to be done, so I am not going to do it. You have asked for a jury trial, you are going to get a jury trial in this case, and the time comes for me to pass my judgment on those two issues, I have to do so, but not at this time.

Return the jury to the Court Room.

(Whereupon the jury returns to the Court Room.) [189]

The Court: Members of the jury, you have now received all of the instructions that I shall give you in this case, and you may retire and deliberate upon your verdict. The form of verdict will be handed to you by the Crier in time for your deliberations. You may retire at this time.

(Whereupon at 10:45 a.m. the jury retires to deliberate.)

[Endorsed]: Filed April 25, 1955.

[Endorsed]: No. 14813. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Mary V. Heavingham, Special Administratrix of the Estate of Arthur V. Heavingham, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 9, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14813

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Appellant,

vs.

MARY V. HEAVINGHAM, Special Administra-
trix of the Estate of Arthur V. Heavingham,
Deceased, Appellee.

APPELLANT'S STATEMENT OF POINTS

Agreeably to Rule 17, paragraph 6, of the Rules of the above Court, appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely.

I.

The points upon which appellant intends to rely are as follows:

1. The trial court erred in instructing the jury that under the evidence they could award damages for conscious pain and suffering by the decedent because there was a complete failure of proof upon this issue.

2. The trial court erred in refusing to give defendant's proposed Instruction No. 9 to the effect that the jury could not include in their award any sum for claimed conscious pain and suffering by the decedent.

3. The verdict for \$75,000 is excessive in that it is apparent from its magnitude that the giving of the instruction erroneously authorizing the jury to consider the issue of conscious pain and suffering by the decedent was prejudicial to the defendant.

Dated: July 18, 1955.

/s/ ARTHUR B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Appellant, Southern
Pacific Company

Acknowledgment of Service attached.

[Endorsed]: Filed July 18, 1955. Paul P. O'Brien,
Clerk.

